SUPREME COURT OF THE UNITED STATES

No. ~~210.~~ 95.

WILLIAM SHEETS, PLAINTIFF IN ERROR,

vs.

LESSEE OF HENRY R. SELDEN, HARMON WOODRUFF, AND NICHOLAS E. PAINE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

GOVERNMENT PRINTING OFFICE.

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1 Pleas of the circuit court of the United States within and for the seventh judicial circuit and district of Indiana, begun, continued, and holden at Indianapolis, in said district, on the first day of August, in the year of our Lord one thousand eight hundred and sixty-two, before the honorable Samuel H. Treat, district judge of the United States.

JOHN DOE, ex. dem., HENRY R. SELDEN. HARMON WOODRUFF, & NICHOLAS E. PAINE, *vs.* WILLIAM SHEETS. } Ejectment.—No. 24.

Be it remembered, that heretofore, to wit, on the 23d day of June, in the year of our Lord one thousand eight hundred and sixty, the plaintiff, by his attorneys, filed in the clerk's office of said court his certain declaration, in the words and figures following, to wit:

Declaration.

In the circuit court of the United States for the district of Indiana, Nov. term, 1860.

STATE OF INDIANA, *ss:*

John Doe complains of William Sheets: for that Henry R. Selden, Harmon Woodruff, and Nicholas E. Paine, citizens of the States of New York, on the 1st day of June, 1860, in the district aforesaid, had demised to the said John the following described tracts and parcels of land, to wit: begining at the southeast corner of

2 square number fifty, (50,) on the plat of the city of Indianapolis, in the district aforesaid; thence north with the eastern boundary of said square, one hundred and twenty feet, (120,) to about the out-loe of the berme bank of the cross-cut canal, to the basin; thence west on a line parallel with the east and west streets of said city, one hundred and ninety-eight (198) feet, to the east line of the alley running north and south through said square; thence south with said alley to the north side of market street; thence east to the place of begining, containing half an acre, more or less; and also the following tract and parcel of land situate in the city of Indianapolis, and district aforesaid, to wit: a strip of land forty (40) feet wide, bounded on the north by the top water-line of the northern arm of the lower mill-basin; on the south by a line parallel and forty feet south of said northern boundary; on the west by the top water line of the lower basin of said central canal, in Indianapolis; and on the east by the top water-line of the upper basin of said canal; and also five other acres of arable ground, five other acres of ground covered with water, two mill-houses, five out-houses, five yards and five gardens, each of the value of five hundred dollars, and all of which tenements are in

the city of Indianapolis, in the district aforesaid: To have and to hold the same to the said John, from the 1st day of June, in the year aforesaid, for and during the term of twenty years, thence next
3 ensuing; by virtue of which demise the said John entered into the said tenements, with the appurtenances, and was possessed thereof, for the term aforesaid. And the said John, being so thereof possessed, the said Sheets, afterwards, to wit, then and there with force and arms entered into the said tenements, with the appurtenances, and ejected the said John therefrom, and other wrongs to the said John then and there did, to his damage one cent. And therefore he sues, &c.

McDONALD & WALKER,
Pl'ff's' Att'ys.

Notice to tenant.

To Mr. William Sheets, a citizen of the State of Indiana:

SIR: I am informed that you are in possession of, or claim title to, the premises in this declaration mentioned, or to some part thereof, and I, being sued in this action as a casual ejector, and having no title to the said premises, do advise you to appear at the next term of the United States circuit for the district of Indiana, to be begun and holden at Indianapolis, on the 3d Monday in November, 1860, and make yourself defendant in my stead; otherwise judgement will then be entered against me by default, and you will be turned out of possession.

RICHARD ROE.

June 21st, 1860.

And afterwards, to wit, on the 24th day of November, in the year of our Lord one thousand eight hundred and sixty, at a circuit
4 court of the United States begun and holden at Indianapolis, in the district aforesaid, before the honorable Elisha M. Huntington, district judge of the United States, for said district of Indiana, it is ordered, by the counsel of the attorneys for both parties, that William Sheets be made defendant instead of the now defendant Roe, and do forthwith appear at the suit of the plaintiff, and receive a declaration in an action of trespass and ejectment for the premises described in the original declaration filed in this cause, for which said Sheets intends, as tenement, to defend this action of trespass and ejectment. And it is further ordered by like consent, that the said Sheets do forthwith plead not guilty thereto; and upon the said trial of the issue confess lease, entry, and ouster, and that he was, at the time of the service of the said declaration, in possession of the premises therein described, and that he insists upon the title only; otherwise let judgement be entered for the plaintiff against the now defendant Richard Roe by default; and if, upon the trial of the said issue, the said Sheets shall not confess lease, entry, and ouster, and such possession as aforesaid, whereby the plaintiff shall not be able further to prosecute the said suit against the said Sheets, then no costs shall be allowed for not further prosecuting the same;

but the said Sheets shall pay costs to the plaintiff in that case to be taxed. And it is further ordered, that if, upon the trial of the said issue, a verdict shall be given for the said Sheets, or it shall happen that the said plaintiff shall not further prosecute the said suit for any other cause than for not confessing lease, entry, and ouster, and such possession as aforesaid, then the lessors of the plaintiff shall pay to the said Sheets costs in that case to be adjudged.

McDONALD & WALKER, *Att'ys for Pl'ff.*
MORRISON & RAY, *Att'ys for Def't.*

2d declaration and plea.

And the said plaintiff now files his declaration against the said William Sheets, and the said William Sheets now files his plea of not guilty, to wit: And the said William Sheets comes and defends the force and injury, when, &c.; and for plea says that he is not guilty in manner and form as the plaintiff has above declared against him. And of this he puts himself upon the country.

MORRISON & RAY,
Att'ys for Def't.

And the plaintiff doth the like.

McDONALD & WALKER,
Pltfs' Att'ys.

And issue being thereupon joined, this cause is continued.

And afterwards, to wit, on the 29th day of May, in the year of our Lord one thousand eight hundred and sixty-one, at a circuit court of the United States, begun and holden as aforesaid, before the honorable judge aforesaid, come the parties by counsel, and upon motion the plaintiff has leave to amend his declaration herein. And day is given.

And afterwards, to wit, on the 30th day of May, in the year aforesaid, at a circuit court begun and holden as aforesaid, before the honorable judge aforesaid, come the parties by counsel, and the plaintiff files his amended declaration in the words and figures following, to wit:

Amended declaration.

The plaintiff further complains of said defendant, William Sheets, who is a citizen of the State of Indiana: for that Henry H. Selden, who is a citizen of the State of New York, on the first day of June, 1860, in the district aforesaid, had demised to the said John Doe the following described tracts and parcels of land, to wit: begining at the southeast corner of square number fifty, (50,) on the plat of the city of Indianapolis, in the district aforesaid; thence north with the eastern boundary of said square, one hundred and twenty feet to about the out-loe of the berme bank of the cross-cut canal to the basin; thence west on a line parallel with the east and west streets of said city, one hundred and ninety-eight feet, (198,) to the east line of the alley running north and south through said square; thence south with

said alley to the north side of Market street; thence east to the place of begining, containing one-half an acre, more or less; and also the following tract and parcel of land situate in the city of Indianapolis, and district aforesaid, to wit: a strip of land forty (40) feet wide, bounded on the north by the top water-line of the northern arm of the lower mill-basin, on the south by a line parallel and forty feet south of said northern boundary, on the west by the top water-line of the lower basin of said central canal in Indianapolis, and on
7 the east by the top water-line of the upper basin of said canal; and also five other acres of arable land and ground, five other acres of land and ground covered with water, two mill-houses, five out-houses, five yards, and five gardens, each of the value of five hundred dollars, and all of which tenements are in the city of Indianapolis, and State of Indiana: To have and to hold the same to the said John Doe, from the first day of June, in the year aforesaid, for and during the term of twenty years thence next ensuing; by virtue of which demise the said John Doe entered into the said tenements, with the appurtenances, and was so possessed thereof for the term aforesaid. And the said John, being so thereof possessed, the said Sheets, who is a citizen of the State of Indiana, afterwards, to wit, then and there with force and arms entered into the said lands and tenements, with the appurtenances, and ejected the said John therefrom, and other wrongs to the said John then and there did, to his damage one cent. And therefore he sues, &c.

And for that Harman Woodruff, a citizen of the State of New York, on the first day of June, in the year 1860, in the district aforesaid, had demised to John Doe the following described tracts and parcels of land, to wit: begining at the southeast corner of square No. 50, on the plat of the city of Indianapolis, in the district aforesaid; thence north with the eastern boundary of said square 120 feet, about the out-loe of the berme bank of the cross-cut canal to the basin; thence west on a line parallel with the east and west streets
8 of said city, one hundred and ninety-eight (198) feet, to the east line of the alley running north and south through said square; thence south with said alley to the north side of Market street; thence east to the place of begining, containing one-half of one acre, more or less; and also the following tract and parcel of land, situate in the city of Indianapolis and district aforesaid, to wit: a strip of land forty feet wide, bounded on the north by the top water-line of the northern arm of the lower mill-basin, on the south by a line parallel and forty feet south of said northern boundary, on the west by the top water-line of the lower basin of the central canal, in the city of Indianapolis, and on the east by the top water-line of the upper basin of said canal, and also five other acres of arable ground, five other acres of ground and land covered with water, two mill-houses, five out-houses, five yards, and five gardens, each of the value of five hundred dollars, and all of which lands and tenements are in the city of Indianapolis, and district aforesaid: To have and to hold the same to the said John Doe from the 1st day of June, in the year aforesaid, for and during the term of twenty years thence next ensuing; by

virtue of which demise the said John entered into the said tenements and lands, with the appurtenances, and was possessed thereof for the term aforesaid; and the said John, being so thereof possessed, the said Sheets, who is a citizen of the State of Indiana, afterwards, to wit, then and there with force and arms entered into the said lands and tenements, with the appurtenances, and ejected the said John therefrom, and other wrongs to the said John then and there did, to his damage one cent, and therefore he sues, &c.

And for that Nicholas E. Paine, a citizen of the State of New York, on the first day of June, 1860, in the district aforesaid, had demised to the said John Doe the following described tracts and parcels of land, to wit: begining at the southeast corner of square No. 50, on the plat of the city of Indianapolis, in the district aforesaid; thence north with the eastern boundary of said square 120 feet to about the out-loe of the berme bank of the cross-cut canal to the basin; thence west on a line parallel with the east and west streets of said city 198 feet to the east line of the alley running north and south through said square; thence south with the alley to the north side of Market street; thence east to the place of begining, containing one half of one acre, more or less. And also the following tract and parcel of land, situate in said city of Indianapolis and district aforesaid, to wit: a strip of land forty feet wide, bounded on the north by the top water-line of the northern arm of the lower mill-basin; on the south by a line parallel and forty feet south of said northern boundary, and on the west by the top water-line of the lower basin of said central canal, in Indianapolis, and on the east by the top water line of the upper basin of said canal; and also five other acres of arable land, five other acres of land covered with water, five yards, two mill-houses, five yards, each of the value of five hundred dollars; and all of which lands and tenements are in the city of Indianapolis, and district aforesaid: To have and hold the same to the said John Doe from the 1st day of June, 1860, for and during the term of twenty years, thence next ensuing; by virtue of which demise the said John Doe entered into the said lands and tenements, with the appurtenances, and was possessed thereof for the term aforesaid. And the said John, being so thereof possessed, the said Sheets, who is a citizen of the State of Indiana, afterwards, to wit, then and there with force and arms entered into the said lands and tenements, with the appurtenances, and ejected the said John Doe therefrom, and other wrongs to the said John Doe then and there did, to his damage of one cent. And therefore he sues, &c.

"McDONALD, WALKER, & THOS. A. HENDRICKS.
"All'ys for Pl'ff."

And day is given.

Motion for bill of particulars.

And afterwards, to wit, on the 1st day of June, in the year aforesaid, at the circuit court aforesaid, began and holden as aforesaid, before the honorable judge aforesaid, come now the parties by counsel, and the defendant moves the court for a bill of particulars

of the covenants of the lease under which the plaintiff claims a forfeiture. And day is given.

And afterwards, to wit, on the 3d day of June, in the year aforesaid, at the circuit court begun and holden as aforesaid, before the honorable judge aforesaid, come the parties by counsel, and
11 the court being sufficiently advised, sustain the motion heretofore made for a bill of particulars; and thereupon the plaintiff files the said bill of particulars, to wit:

Bill of particulars.

In compliance with the order of the court herein made, the lessors of the plaintiff say:

1st. That by the terms of each of the leases under which the defendant claims possession of the premises in the declaration mentioned, it is provided that the rents therein reserved shall be paid semi-annually, on the 1st days of May and November in every year, during the continuance of said leases, respectively. Under one of said leases, which is dated January 1st, 1840, a large amount of rent, viz: $\$110\frac{48}{100}$ for the six months between November 1st, 1859, and May 1st 1860, became due and payable on the day last aforesaid; and at the same time and for the same period, under the same lease, dated February 12th, 1839, another large amount of rent, to wit, $\$220\frac{96}{100}$, became due and payable. And on the said 1st day of May, 1860, at a convenient time of the day, just before sundown, on the most public place on the premises mentioned in the lease first aforesaid, the said lessors of the plaintiff demanded said sum of $\$110\frac{48}{100}$ of rent, and at the same time and place, as a distinct act, and for the rent of the same premises for the six months aforesaid, demanded as much rent as was then due therefor. And also, at a convenient time of the day, just before sun down, of the said first day of May, 1860, at the most public place on the premises, mentioned in the said lease dated February 12th, 1839, the said lessors of the plaintiff
12 demanded the said sum of $\$220\frac{96}{100}$ rent, and at the same time and place, and as a distinct act, also demanded, for the said period of six months, as much rent as was then due for the premises last aforesaid. And afterwards, to wit, on the 1st day of June, 1860, the said lessors of the plaintiff entered upon said premises respectively, and in the most public place on each of them repeated the demands, and none of said rents being then paid, declared said leases forfeited, respectively; and on account of the breaches of said covenants to pay rent, entered upon and took possession of said premises respectively. And the said lessers further say that by each of said leases it was and is provided that if, at any time, any installment which should become due for rent, should remain unpaid for one month from the time it should become due, or if the tenants mentioned in said leases should, in any respect, violate or fail to comply with any of the stipulations contained in said leases, respectively, then and in either case all the rights and privileges secured to them, respectively, by said leases respectively should cease and determine,

and that the State of Indiana, by which said leases were made, and under which the lessors of the plaintiff claim said premises by deed of conveyance, should have power to enter upon and take possession of said premises and resume all the rights and privileges by said leases respectively granted to the lessees therein named. And said lessors say that no part of said rents has ever been paid.

13 And the plaintiff further says, that all said demands were made at a proper and convenient time of the days above respectively named; that during said days respectively said premises respectively were wholly unoccupied by any person; and that on neither of said days was the said Sheets, or any agent of his, at any time on any of said premises, and the same were, during all said days, shut up and wholly abandoned. And both before and after said days, and before the commencement of this suit, the defendant often personally declared to said lessors of the plaintiff that he would never pay any part of the rents so demanded as aforesaid, and as to the said rents wholly set said lessors at defiance.

2nd. The lessors of the plaintiff further say, that *that*, on the 12th day of Feb., 1839, the State of Indiana owned in fee the premises in the declaration mentioned, and continued such owner till the 30th day of June, 1851; that by a lease to run 30 years, said State leased, on the day first aforesaid, the premises first named in the declaration to the defendant, and one Daniel Yanders; and on the first day of January, 1840, said State, by a lease of that date, leased to the defendant the premises secondly named in said declaration for 30 years; which leases were of said premises, and certain water-power and privileges therewith respectively connected; that by the terms of said leases respectively, the rents were to be due, and payable semi-annually, on the first days of May and November of each year;

14 and it was in each of said leases provided, that if, at any time, any installment which should become due for rent should remain unpaid for one month from the time it should become due, or if said tenants respectively should, in any respect, violate, or fail to comply with any of the stipulations contained in said leases respectively, the rights and privileges respectively secured to them by each of said leases should cease and determine, and said State might enter on said premises, and take possession thereof, for such forfeiture. And by virtue of said leases, large sums of money became due to said State for rents of said premises, water-power, and privileges, to wit: on the lease first aforesaid, the sum of $666 66 fell due on the first days of November and May every year, from the 1st day of Aug., 1846, till the 30th day of June, 1851, and on the lease last aforesaid, the sum of $333 33 fell due on the first days of May and November, every year, from the 1st day, of August, 1846, to the 30th day of June 1851.

And the said several sums of money for rent, so falling due as aforesaid, have never been paid, nor has any part thereof been paid, though by said leases they ought to have been paid unto the State treasury when they respectively became due. And afterwards, to wit, on the 30th day of June, 1851, the State conveyed said pre-

mises to one Francis A. Conwell, and the same, before the commencement of this suit, came to the lessors of the plaintiff by inter-
15 mediate conveyances, to wit, on the 2nd day of October, 1857. And the lessors of the plaintiff say, that from the first day of August, 1846, till this time, neither the defendant, nor any one else, has ever paid any rent for said premises, though during all that time large sums of money have fallen due therefor on every first day of May and November, and during all that time the defendant, though often requested, has utterly refused to pay any of said rents, and during all that time, set the State and all persons holding said premises under the State at defiance, and after said lessors of the plaintiff became the owners of said premises, to wit, on Jan. 1, 1859, he refused to pay them any such rent, set them at defiance, and refused to recognise them as his landlords, and denied their title to said premises. And said lessors of the plaintiff say that, though the defendant now claims possession of said premises solely by virtue of said leases, yet, by reason of the matters aforesaid, he has long since wholly forfeited all right to said possession.

3d. Further specifying, the lessors of the plaintiff say, that at the times mentioned in the first specification aforesaid, the rents therein mentioned became due and payable, according to the defendant's use of the premises, for the period therein mentioned, under the stipulations of said leases requiring him to pay rent; and the same being then due, the defendant, Sheets, thence, and until the commencement of this suit, failed and refused to pay the same, or any part
16 thereof, and the lessors of the plaintiff claim that under the provision of the leases the term of the defendant, Sheets, and all his right and interest in the property described in the leases became null and void.

4th. Further specifying, the lessors of the plaintiff say, that at the times mentioned in the first specification aforesaid, there became due and payable to said lessors, under the premises of said leases, requiring the said Sheets to pay rents according to the terms of said leases, a large sum of money according to the terms of said leases, and the use of said premises by said Sheets under said leases, and the same being so due and payable to said Sheets, failed and refused to pay the same, thence, and until the commencement of this suit, whereby, under the terms and conditions of said leases, the said term of the said Sheets and his right and estate in said premises became void, and the lessors, as the owners thereof as aforesaid, became entitled to the possession thereof.

McDONALD & HENDRICKS,
Att'ys for Pl'ff.

And day is given.

And afterwards, to wit, on the 5th day of June, in the year aforesaid, at the circuit court began and holden as aforesaid, before the honorable judge aforesaid, came the parties by counsel, and the de-

fendant refiles his consent rule and plea of general issue, which are in the words and figures following, to wit :

Consent rule refiled.

17 It is ordered, by the consent of the attorneys for both parties, that William Sheets be made defendant instead of the now defendant Roe, and do forthwith appear at the suit of the plaintiff, and receive a declaration in an action of trespass and ejectment for the premises described in the original declaration filed in this cause, for which said Sheets intends as tenant to defend this action of trespass and ejectment. And it is further ordered, by the like consent, that the said Sheets do forthwith plead not guilty thereto; and upon the said trial of the issue, confess lease, entry, and ouster, and that he was, at the time of the service of the said declaration, in possession of the premises therein described; and that he insist upon the title only; otherwise let judgement be entered for the plaintiff against the now defendant Richard Roe by default, and if, upon trial of the said issue, the said Sheets shall not confess lease, entry, and ouster, and such possession as aforesaid, whereby the plaintiff shall not be able further to prosecute the said suit against said Sheets, then no costs shall be allowed for not further prosecuting the same, but the said Sheets shall pay costs to the plaintiff in that case to be taxed. And it is further ordered, that if, upon the trial of the said issue, a verdict shall be given for said Sheets, or it shall happen that the plaintiff shall not further prosecute the said suit for any other cause than for not confessing lease, entry, and ouster, and such possession as aforesaid, then the lessors of the plaintiff shall pay to the said Sheets costs in that case to be adjudged.

Nov. 20th, 1860.

18 McDONALD & WALKER,
Att'ys for Pl'ff.
MORRISON & RAY,
Att'ys for Def't.

Plea.

And the said William Sheets comes and defends the force and injury, when, &c., and for plea says that he is not guilty in manner and form as the plaintiff has above declared against him, and of this he puts himself upon the country.

MORRISON & RAY,
Att'ys for Def't.

And the plaintiff doth the like.

McDONALD & WALKER,
Pl'ff's' Att'ys.

Jury.

And thereupon comes a jury, to wit : John E. Pemberton, Nathaniel Moore, Rufus Bliss, Oscar H. Kendrick, Ambrose D. Hawkins, David E. Pulse, Isaac W. Hart, Nathan Garrett, Hugh Neeley, B. F. Burlingame, Robert W. Robinson, and William Forsythe, twelve good and lawful men, of the district of Indiana, who, being empannelled,

tried, and sworn well and truly to try the issue and a true verdict give according to the evidence, after hearing a portion of the evidence, by leave of court and agreement of parties, separate until to-morrow morning.

And afterwards, to wit, on the 6th day of June, in the year aforesaid, at the circuit court began and holden as aforesaid, before the honorable judge aforesaid, come the parties by counsel, and thereupon comes the jury aforesaid, who, after hearing a portion of the evidence, by leave of court and agreement of parties, separate until to-morrow morning 9 o'clock.

And afterwards, to wit, on the 7th day of June, in the year
19 aforesaid, at the circuit court begun and holden as aforesaid, before the honorable judge aforesaid, come the parties by counsel, and thereupon comes the jury aforesaid, who, after hearing a portion of the evidence, by leave of court and agreement of parties, separate until to-morrow morning.

And afterwards, to wit, on the 8th day of June, in the year aforesaid, at the circuit court begun and holden as aforesaid, before the honorable judge aforesaid, come the parties by counsel, and thereupon comes the jury aforesaid, who, after hearing a portion of the evidence, by leave of court and agreement of parties, separate until Tuesday morning 9 o'clock.

And afterwards, to wit, on the 11th day of June, in the year aforesaid, at the circuit court begun and holden as aforesaid, before the honorable judge aforesaid, come the parties by counsel, and thereupon comes the jury aforesaid, who, after hearing a portion of the evidence, by leave of court and by agreement of parties, separate until to-morrow morning 9 o'clock.

And afterwards, to wit, on the 12th day of June, in the year aforesaid, at a circuit court begun and holden as aforesaid, before the honorable judge aforesaid, come the parties by counsel, and thereupon comes the jury aforesaid, who, after hearing a portion of the evidence, by leave of court and agreement of parties, separate until to-morrow morning 9 o'clock.

20 And afterwards, to wit, on the 13th day of June, in the year aforesaid, at the circuit court begun and holden as aforesaid, before the honorable judge aforesaid, come the parties by counsel, and thereupon comes the jury aforesaid, who, after hearing the concluding evidence, and a portion of the arguments of counsel, by leave of court and agreement of parties, separate until to-morrow morning 9 o'clock.

And afterwards, to wit, on the 14th day of June, in the year aforesaid, at the circuit court aforesaid, begun and holden before the honorable judge aforesaid, come the parties by counsel, and thereupon comes the jury aforesaid, who, after hearing a portion of the arguments of counsel, by leave of court and agreement of parties, separate until to-morrow morning.

And afterwards, to wit, on the 15th day of June, in the year aforesaid, at the circuit court aforesaid, begun and holden as aforesaid, and before the honorable judge aforesaid, come the parties by

counsel, and thereupon comes the jury aforesaid, who, after hearing the concluding arguments of counsel and receiving the charge of the court, retire to their room to deliberate, and after due deliberation, return into court the following as their verdict, to wit:

Verdict and motion for new trial.

"We, the jury, find the defendant guilty, and assess the plaintiffs' damages at one cent." Thereupon the defendant moves the
21 court for a new trial. And day is given.

And afterwards, to wit, on the 2d day of July, in the year aforesaid, at the circuit court begun and holden as aforesaid, before the honorable judge aforesaid, come the parties by counsel, and the court, being sufficiently advised of the premises, overrule the motion of the defendant to set aside the verdict and grant him a new trial herein, and the plaintiff moves the court to render judgment upon the verdict, which is done.

Judgment.

It is therefore considered by the court that said plaintiff recover against said defendant his said term yet to come in the premises aforesaid, with the appurtenances in the declaration mentioned, with the costs and charges herein, taxed at ——— dollars and — cents.

New trial granted.

And now come the parties by their attorneys, and the defendant moves the court to set aside the judgment rendered herein and to grant him a new trial, pursuant to the premises of section 601, chapter 1, Revised Statutes of Indiana of 1852, vol. 2d, page 167, and upon consideration the court grants said motion upon the payment of all costs herein within 60 days, and upon failure to pay the costs within said time by defendant, said judgment is to remain in force, and the plaintiff may have the proper writ of execution thereon, and the plaintiff excepts, in the words and figures following, to wit:

Pl'ff excepts.

Be it remembered, that on the 2d day of July, 1861, at the May term, 1861, of the United States circuit court for the district
22 of Indiana, the said court rendered the following judgment on the verdict of the jury, to wit: It is therefore considered by the court that the said plaintiff recover against said defendant his said term yet to come in the premises aforesaid, with the appurtenances in the declaration mentioned, and the costs and charges herein, taxed at ——— dollars and — cents. And after the said judgment had been so rendered as aforesaid, the defendant thereupon moved the court to vacate said judgment, and grant a new trial herein, which motion was based on the provisions of section 601, article XXIX of the 2d volume of the Revised Statutes of Indiana alone, which motion the plaintiff opposed. But the court granted

said motion, having stated to the counsel for the defendant, before entering upon trial, that under the former ruling of the court in a similar case, upon the statute above referred to, said defendant would be entitled to another trial if the verdict should be against him, and the defendant having entered into trial with that express understanding, and the plaintiff at the same time objecting thereto. And upon the granting of said motion, the court made the following order in relation thereto, to wit: "And now come the parties by their attorneys, and the defendant moves the court to set aside the judgment rendered herein, and to grant him a new trial, pursuant to the provisions of section 601, chapter 1, Revised Statutes of Indiana of 1852, vol. 2, page 167, and upon consideration, the court grant the
23 said motion upon the payment of all costs herein within 60 days, and upon failure to pay the costs within said time by defendant, said judgment is to remain in force and the plaintiff may have his writs of execution thereon." To which action of the court in granting said motion and making said order, the plaintiff at the time excepted; and he prays that this his bill of exceptions be signed and sealed by the court, and made a part of the record herein, which is done.

E. M. HUNTINGTON. [L. S.]

Continuance.

And afterwards, to wit, on the 19th day of November, in the year aforesaid, at the circuit court of the United States for the seventh judicial circuit and district of Indiana, begun, continued, and holden at Indianapolis, in said district, before the honorable Samuel H. Treat, district judge of the United States, come the parties by counsel, and by agreement this cause is continued at the plaintiffs' costs.

Pl'ffs' motion to amend bill of particulars.

And afterwards, to wit, on the 3d day of June, in the year aforesaid, at the circuit court begun and holden as aforesaid, before the honorable judge aforesaid, come the parties by their attorneys, and the plaintiff moves the court for leave to amend their bill of particulars heretofore filed, which motion is granted, and they are ruled to make their amendment on or before to-morrow morning. And afterwards, to wit, on the 4th day of June, in the year aforesaid, at the circuit court begun and holden as aforesaid, before the honor-
24 able judge aforesaid, come the parties, and the plaintiff files his bill of particulars as amended, and this cause is continued.

2d jury trial.

And afterwards, to wit, on the 24th day of July, in the year aforesaid, at the circuit court of the United States for the seventh judicial circuit and district of Indiana, begun, continued, and holden as aforesaid, before the honorable judge aforesaid, come the parties by counsel, and thereupon comes a jury, to wit, Eli McCalley, Samuel H. Owen, Christian Coon, John Dunning, A. T. Whittlesey, J. W.

Eggleston, John R. Ross, Smith Jones, Herbert Williams, Abner Hobbs, Benjamin Gonzales, and John W. Hamilton, twelve good and lawful men, of the district of Indiana, who, being empannelled, tried, and sworn well and truly to try the issue and a true verdict give according to the evidence, after hearing a portion of the evidence, by leave of court and agreement of parties, separate until to-morrow morning 9 o'clock.

And afterwards, to wit, on the 25th day of July, in the year aforesaid, at the circuit court begun and holden as aforesaid, before the honorable judge aforesaid, come the parties, by counsel, and thereupon comes the jury aforesaid, who, after hearing the evidence and a portion of the arguments of counsel, by leave of court and agreement of parties, separate until to-morrow morning 9 o'clock.

And afterwards, to wit, on the 26th day of July, in the year aforesaid, at the circuit court holden as aforesaid, before the honorable judge aforesaid, come the parties by counsel, and thereupon comes the jury aforesaid, who, after hearing the evidence, the arguments of counsel, and receiving the charge of the court, retire to their room to deliberate upon their verdict: after due deliberation, return into court the following as their verdict, to wit:

Verdict.

"We, the jury, find the defendant guilty, for and by reason of the forfeiture of the demises mentioned in the bill of particulars, for the non-payment of rents, reserved in and by said demises, respectively, mentioned in said bill of particulars, and we assess the plaintiffs' damages at one cent." Whereupon, the jury is discharged, and day is given.

Motion for new trial.

And afterwards, to wit, on the 1st day of August, in the year aforesaid, at the circuit court of the United States, begun and holden as aforesaid, before the honorable judge aforesaid, now again come the parties, and the defendant moves the court for a new trial herein, and files his reasons therefor in the words and figures following, to wit:

Reasons.

1st. That the verdict is contrary to law.

2d. That the verdict is contrary to the evidence.

3d. That the court erred in the instructions given to the jury.

4th. The court erred in refusing the instructions prayed for by the defendant's counsel.

Which motion, on consideration, is by the court overruled.

Judgment.

It is therefore considered that the plaintiff recover of the defendant his term in the declaration mentioned, and his damages to the sum of one cent, so by the jury assessed as aforesaid, together with his costs and charges herein laid out and expended.

And it is ordered by the court, that for the premises in the declaration mentioned, the plaintiff have his writ of possession.

26 And thereupon come the parties, by their counsel, and the defendant files his several bills of exceptions, taken herein during the trial of this cause, which are allowed by the court, and are in the words and figures following, to wit:

Exceptions No. 1.

Be it remembered, that before going into trial of the above-entitled suit, and before the jury was empannelled, the defendant, by his counsel, moved the court to strike out and reject from the bill of particulars filed by the lessors of the plaintiff, the second paragraph of said particulars, because it does not state facts sufficient to establish a forfeiture of the said leases or either one of them; which motion the court overruled.

And the defendant thereupon moved the court to reject and strike out from the said bill of particulars the third paragraph thereof, because it does not state facts sufficient to establish a forfeiture of said leases, or either of them; which motion the court also overruled.

And the defendant thereupon moved the court to reject and strike out from the said bill of particulars the fourth paragraph thereof, because it does not state facts sufficient to establish a forfeiture of the said leases, or either of them; which motion the court also overruled.

To which several opinions of the court, overruling the said several motions, the defendant, by his counsel, excepted at the time, and had leave given to file this his bill of exceptions, which

27 is now done, signed, sealed, and made a part of the record.

S. H. TREAT. [L. S.]

Exceptions No. 2.

Be it remembered, that on the trial of the above-entitled suit on the 11th judicial day of the July term of said court, the lessors of the plaintiff, to prove their cause of action against the said defendant, produced and offered in evidence an authenticated copy of a written instrument, which is in the words and figures following, to wit:

This indenture, made this thirtieth day of June, in the year of our Lord one thousand eight hundred and fifty-one, between Joseph A. Wright, governor of the State of Indiana, and Erastus W. H. Ellis, auditor of said State, of the first part, and Francis A. Conwell of the second part, witnesseth: That in pursuance of the provision of an act of the legislature of said State, entitled "An act to authorize the governor of Indiana to compromise with, and to cause suit to be brought against, the lessees of the water-power of the northern division of the central canal," approved January 19, 1850, also an act entitled "An act to authorize the sale of the northern division of the central canal," approved January 21, 1850, the said Joseph A. Wright and Erastus W. H. Ellis caused an advertisement to be published in the Indiana State Journal and the Indiana State Sen-

tinel, also in newspapers of general circulation published in the cities of Louisville, Cincinnati, New York, Philadelphia, and Boston, at least sixty days before the sale, setting forth the time, place, and conditions of such sale, as specified in said acts; and did, on the seventeenth day of November, eighteen hundred and fifty, at the door of the capitol, in Indianapolis, sell to George G. Shoup, James Rariden, and John S. Newman, of the State aforesaid, all the right, title, and interest of the State of Indiana in and to that portion of the northern division of the central canal situate north of Morgan county, and all the rents which shall become due after the sale of said property, and the water-power and appurtenances thereto belonging, and all the right, title, interest, claim, and demand which the State may hold or possess in such portion of said canal, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water-power, structures, and all the appurtenances thereunto belonging, for the sum of two thousand four hundred and twenty-five dollars, being more than two-thirds of the appraised value thereof, the said Shoup, Rariden, and Newman being the highest and best bidder for the same; which said purchase-money, with interest thereon, has been paid into the treasury of the State of Indiana, by the parties aforesaid, as appears by the receipt of the treasurer of state, No. 7939, bearing date February the seventh, eighteen hundred and fifty-one.

And whereas the legislature aforesaid enacted a joint resolution entitled "A joint resolution on the subject of the sale of the northern division of the central canal," approved February 7th, 1851, confirming said sale, and directing the governor aforesaid to convey said portion of said canal, with the rights, privileges, and appurtenances thereto belonging, as sold by him, to the purchasers, their heirs and assigns, so soon as said purchasers, their heirs and assigns, shall pay the purchase-money by them severally bid, and executed the bond pursuant to the conditions of sale to the acceptance of his excellency the governor:

And whereas the said Shoup, Rariden, and Newman, on the seventh day of February, eighteen hundred and fifty-one, executed an instrument in writing, and thereby assigned and transferred to Francis A. Conwell, his heirs and assigns, all their right, title, and interest in the purchase aforesaid:

And whereas the said Conwell, on the thirtieth day of June, eighteen hundred and fifty-one, executed and delivered to the governor aforesaid the bond spoken of and required in the several acts herein named to the acceptance and approval of the said governor:

Now, therefore, be it known, that, by virtue of the power vested in us by the acts and joint resolution herein named, we, Joseph A. Wright, governor of the State of Indiana, and Erastus W. H. Ellis, auditor of said State, do hereby convey to the said Francis A. Conwell, his heirs and assigns, forever, all the property sold as herein specified, being all the right, title, interest, claim, and demand which the State may hold or possess in the northern division of the central canal north of Morgan county, and all the rents which may

31 have become or shall become due after the sale of said property, and the water-power and the appurtenances thereunto belonging, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water-power, structures, and all the appurtenances thereunto belonging: To have and to hold the same in as full and complete a manner as the undersigned are authorized by the laws aforesaid to convey the same.

In testimony whereof, we have hereunto set our hands and affixed the seal of said State, at the city of Indianapolis, the day and year first above written.

JOSEPH A. WRIGHT,
Governor.

[L. S.] ERASTUS W. H. ELLIS,
Auditor of State.

CHARLES H. TEST, *Secretary of State.*

STATE OF INDIANA,
Marion County, ss:

Be it remembered, that on this first day of July, A. D. 1851, personally appeared before me, the undersigned, a notary public in and for the county and State aforesaid, duly commissioned and qualified according to law, Joseph A. Wright, governor, and Erastus W. H. Ellis, auditor of State, the above-named grantors, and acknowledged the foregoing to be their act and deed for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, the day and year first above written.

[SEAL.] J. B. McCHESNEY, *N. P.*

Recorded July 5th, 1851, at 8 o'clock a. m.

32 To the introduction of which, as a deed of conveyance, the defendant, by his counsel, objected, for the following reasons: 1st. That the said instrument is not a deed of conveyance by the State; and 2d. That at the time of the execution of the instrument the power to execute a deed of conveyance for said premises was not in the governor and auditor of State, but in the governor alone; but the court overruled the objections and allowed the instrument to be read in evidence to the jury as a deed of conveyance by the State. To which opinion of the court, overruling said objections, the defendant, by his counsel, excepts, and prays that this his bill of exceptions be signed, sealed, and made a part of the record; which is done.

S. H. TREAT. [SEAL.]

Exceptions No. 3.

Be it remembered, that on the trial of the above-entitled suit, on the 11th judicial day of the July term of said court, A. D. 1862, the lessors of the plaintiff, to sustain their said action, offered in evidence the following instrument, in writing, purporting to be a lease

from the State of Indiana, to Daniel Yandes and William Sheets, (defendant in this suit,) to wit:

This agreement, made this twelfth day of February, 1839, between the State of Indiana, party of the first part, by D. H. Maxwell, president of the board of int. imp., thereto duly authorized by law, and by order of the board of internal improvement made in pursuance thereof, and Daniel Yandes and William Sheets, of Indianap-
33 olis, Indiana, party of the second part, witnesseth: That said party of the first part, in consideration of the rents reserved, and the covenants of the party of the second part hereinafter contained, and upon the express condition that the party of the second part shall continue during the whole of his term to comply with all and singular the limitations and conditions hereinafter contained, and shall, in every respect, perform all the stipulations of this agreement by said party to be performed, agrees to sell and lease to said party of the second part, for the term of thirty years from and after the first day of January, 1839, subject to the restrictions, limitations, and conditions herein contained, the use and occupation of so much of the surplus water not required for the purposes of navigation at the lock, in the town of Indianapolis, Indiana, canal as will be sufficient, when properly applied, on a "pitch back" or "high breast" wheel, of eleven feet in diameter, with the proper gearing, to be approved by the acting commissioner and engineer having charge of that portion of the canal, to propel not less than three nor more than four run of four and a half feet millstones, to be applied to the manufacture of paper.

It is understood that when the paper mill shall be in good order and all the machinery in full operation, the quantity of water flowing to and used by said mill shall be accurately gauged by some competent engineer, to be selected by said acting commissioner or other authorized agent of the State, at such time as said commis-
34 sioner may deem proper; and the quantity of water then found necessary shall be certified by said engineer on the back of this contract, which quantity shall thereafter be considered the amount leased. The water will be taken by a suitable head-race from the level or pool immediately above said lock on the central canal, and after passing over the wheel will be conducted by a suitable tail-race into the level immediately below said lock. The flow of water to the mill will be regulated and controlled by a permanent regulating weir, to be constructed in the most substantial manner, with stone side and breast walls, agreeably to a plan to be furnished by the commissioner or engineer, to be built, in every respect, according to their direction, so as not to endanger the safety of the canal nor prevent the regular and necessary flow of water from one level to another.

And the said party of the second part, for and in consideration of the right to the use and occupation of said water, agrees to pay to the State a yearly rent, at the rate of one hundred and fifty dollars for each power used by said party—that is to say, for each portion or quantity of water sufficient to propel a run of 4½ feet millstones,

with the necessary apparatus for flouring wheat, with the same fall and on a similar wheel, to be determined by the engineers aforesaid; each run of stones being supposed to grind, on an average, five bushels of wheat per hour: provided the party of the second part shall not be deprived of the use of the water by any act of the
35 State or its agents, or by the inadequacy of the supply of water, for more than one month in *in* the aggregate in any one year. And if, for the purpose of repairing the canal, preventing breaches, removing bars or other obstructions, or making any improvements to the canal or works connected therewith, or in consequence of the breaches, or the inadequacy of the supply of water, the party of the second part shall be either partially or wholly deprived of the use of any portion of the water-power hereby leased, so as to prevent the operation of any of the hydraulic works usually propelled by the water-power hereby leased, such deduction shall be made from the rent accruing on such portion of the water-power as the said party is so prevented from using, as will bear the same proportion to the yearly rent thereof as the time during which the said party has been deprived of its use bears to eleven months. The rent to commence on the first day of November, 1839, and to be paid semi-annually thereafter, on the first days of May and November, in each and every year during the continuance of this lease, to such agent of the State as may be authorized by law to receive the same.

And it is further understood, that the necessary regulating weir, head-race, and trunk to conduct the water to the wheels, and the tail-race to pass it from the wheels to the canal, as above specified, are to be constructed by the party of the second part at their own expense and according to the direction of the acting commis-
36 sioner or engineer on this portion of the canal, and to be kept in good repair, so as to prevent the waste of water.

It is further agreed, that the party of the second part, during the continuance of this lease, shall, at their own expense, keep constantly in good repair the race or trunk above described; and if any breach or other injury shall at any time occur to the canal in consequence of the race or trunk not being faithfully constructed, or being suffered to be out of repairs, or from any negligence of any person employed about the mills, then the said party of the second part shall forfeit and pay to the State the whole cost of repairing such breach or injury. And if the said party of the second part shall refuse or neglect to rebuild, repair, or strengthen said regulating weir, or other works necessary to the security of the canal, after being notified, in writing, by the engineer, superintendent, or other proper agent of the State, that such renewal is necessary for the safety of the canal, such refusal or neglect shall subject the party of the second part to a forfeiture of this contract or lease, at the option of said engineer, superintendent, or other agent of the State in charge of this portion of the canal.

It is expressly understood and agreed by and between the parties, that for the purpose of preventing or repairing breaches, removing obstructions to the navigation of the canal, or for the purpose of

making any improvement in the canal, any authorized agent of the State may cause the water to be drawn out of the canal, and
37 to remain out so long as may be necessary. And the party of the first part further reserves the right to resume, at any time, the use of the water hereby leased, whenever this shall become necessary for the purposes of navigation; and if it shall become necessary to resume the use of so great a portion of the water hereby leased, or of the whole thereof, for so great a portion of the time, as to destroy the value of the privilege, (which fact shall be determined by three judicious disinterested freeholders, one to be chosen by the acting commissioner or other authorized agent of the State, one by the party of the second part, and the third by the two thus chosen,) then the party of the second part shall be absolved from such time from all further liabilities growing out of this agreement, and shall also receive such compensation for his improvements as the said freeholders may consider their fair value.

It is further agreed, that at the expiration of the term of this lease the acting commissioner, or other authorized agent of the State, shall give public notice that proposals will be received for the water privilege hereby leased for a like term of years, which notice shall require that each proposal be accompanied with an agreement on the part of the bidders to pay the party of the second part for all permanent and valuable buildings necessarily erected by said party of the second part, for the use of the water, at such price as said buildings may be adjudged to be worth by three judicious disinterested freeholders chosen, as hereinafter specified, pro-
38 vided such buildings shall be situated on lands belonging to the State, or which can be purchased by said bidder at a reasonable price, to be determined by said appraisers, and said party of the second part shall thereupon be entitled to a renewal of this lease for a like term of thirty years, at such rent as may be offered by the highest responsible bidder. And if no such bid shall be made on the terms aforesaid at a higher rent than is herein specified, then the party of the second part shall be entitled to a renewal on the terms of this lease, and said commissioner shall be authorized to extend or postpone the time of receiving proposals, if he may deem this necessary, to guard the interests of the State against fraudulent or unfair combinations.

And if at any time any instalment which shall become due for rent shall remain unpaid for one month from the time it shall become due, or if the party of the second part shall in any respect violate or fail to comply with any of the stipulations contained in this agreement, then, and in either case, all the rights and privileges secured to said party by this agreement shall cease and determine, and any authorized agent of the State, or lessee under said State, shall have power to enter upon and take possession of the premises, and resume all the rights and privileges hereby granted to the party of the second part and said party of the second part shall moreover be liable to pay for all damages consequent upon such violation of this agreement.

It is further understood and agreed, that said party of the
39 second part shall not sell, assign, or transfer their right or interest derived from this agreement without consent, in writing, of some authorized agent of the State, nor shall the water-power hereby leased be applied to other purposes than that contemplated by this agreement without like authority.

It is also agreed, that the position of the mills shall be fixed by the acting commissioner and engineer on this portion of the canal. The gearing shall be of such proportions that the periphery of the water-wheel, (if an overshot,) when the machinery is in operation, shall move at the rate of five feet per second, and in all other respects the forms of the wheel and other machinery shall be such as will be approved by the acting commissioner and engineer aforesaid.

It is further understood, that the delays occasioned either by high water or by freezing will be at the risk of the party of the second part, and no diminution of the rent shall take place on account of such delay.

And the said party of the first part, in consideration of the rents and agreements hereinbefore specified, further agrees to lease to the party of the second part upon the same conditions, and subject to the same limitations and restrictions herein contained, for the use of the water-power hereby leased for the like term of thirty years, from the first day of January, 1839, the particular portion of ground belonging to the State at said point, included within the following boundaries, to wit: beginning at the southeast corner of square numbered (50,) fifty, on the plat of the town of Indianapolis;
40 thence north with the eastern boundary of said square, one hundred and twenty (120) feet, to about the out-loe of the berm bank of the cross-cut canal to the basin; thence west on a line parallel with the east and west streets of said town, one hundred and ninety-eight (198) feet, to the east line of the alley running north and south through said square; thence south with said alley to the north side of Market street; thence east to the place of beginning, containing a little more than half an acre.

And it is further understood, that upon the renewal of this lease at the end of thirty years, as above provided, the State will be bound to lease only as much water as may then be found adequate to supply the navigation of the canal from this lock to the next feeder below.

In witness whereof, the said parties to this agreement have hereunto set their hands and seal the day and year first above mentioned.

D. H. MAXWELL, *Pres't B'd Int. Imp.* [SEAL.]
DAN'L YANDES. [SEAL.]
WM. SHEETS. [SEAL.]

Signed, sealed, and delivered in presence of—
WM. J. PROUDFOOT.

(Triplicates.)

To the introduction of which as evidence the defendant, by his counsel, excepted, because the said instrument is not a deed on the part of the State of Indiana, it having no seal except by an ink scrawl, done with the pen, appended to the signatures of each of the
41 lessees, and also appended to the signature of "D. H. Maxwell, prest. b'd int. imp.;" but the court overruled the objection, and permitted the said instrument to be read in evidence; to which opinion of the court, overruling said objection and permitting the instrument to be read as evidence, the defendant, by his counsel at the time, excepted, and had leave to file his exceptions, which is now done, signed, sealed and made a part of the record.

S. H. TREAT. [SEAL.]

Exceptions No. 4.

Be it remembered, that on the trial of the above-entitled suit, on the 11th judicial day of the July term of said court, A. D. 1862, the lessors of the plaintiff, by their counsel, offered in evidence the following instrument in writing in support of the issue joined in the cause, to wit:

"This agreement, made this first day of January, 1840, between the State of Indiana, party of the first part, by Noah Noble, acting canal commissioner, thereto duly authorized by law, and by order of the board of internal improvement made in pursuance thereof, and William Sheets, of Idianapolis, Indiana, party of the second part, witnesseth: That said party of the first part, in consideration of the rents reserved, and the covenants of the party of the second part hereinafter contained, and upon the express condition that the party of the second part shall continue during the whole of his term to comply with all and singular the limitations and conditions hereinafter contained, and shall in every respect perform all the
42 stipulations of this agreement by said party to be performed, agrees to sell and lease to said party of the second part for the term of thirty years, from and after the first day of January, 1840, subject to the restrictions, limitations, and conditions hereinafter contained, the use and occupation of so much of the surplus water not required for the purposes of navigation, at the north end of the upper basin in Indianapolis, adjoining and immediately south of the upper tumble, as will be sufficient, when properly applied on an overshot wheel of sixteen feet in diameter with the proper gearing, to be approved by the acting commissioner and engineer having charge of that portion of the canal, to propel two run of four-and-a-half-feet millstones, to be applied to the manufacture of wrapping paper.

It is understood that when the paper mill shall be in good order, and the machinery, with the necessary apparatus, as above described, shall be in full operation, the quantity of water flowing to and used by said mill shall be accurately gauged by some competent engineer, to be selected by said acting commissioner or other authorized agent of the State, at such time as said commissioner may deem proper, and the quantity of water then found necessary shall be certified by said engi-

neer on the back of this contract, which quantity shall thereafter be considered the amount leased. The water will be taken by a suitable head-race from the level or pool immediately above said tumble on the central canal, and after passing over the wheel will be conducted by a suitable tail-race into the level immediately below said
43 tumble. The flow of water to the mill will be regulated and controlled by a permanent regulating weir, to be constructed in the most substantial manner with stone side and breast walls, agreeably to a plan to be furnished by the commissioner or engineer, to be built in every respect according to their direction, so as not to endanger the safety of the canal, nor prevent the regular necessary flow of water from one level to another.

And the said party of the second part, for and in consideration of the right to the use and occupation of the said water, agrees to pay to the State a yearly rent at the rate of one hundred and fifty dollars for each power, it being understood that a "power" means a quantity of water which would be sufficient, if applied on the above prescribed wheel, to propel a run of 4½-feet millstones grinding at an average rate of five bushels of wheat per hour, provided the party of the second part shall not be deprived of the use of the water by any act of the State or its agents, or by the inadequacy of the supply of water, for more than one month in the aggregate in any one year. And if, for the purpose of repairing the canal, preventing breaches, removing bars or other obstructions, or making any improvements to the canal or the works connected therewith, or in consequence of breaches or an inadequate supply of water, the party of the second part shall be either partially or wholly deprived of the use of any portion of the water-power hereby leased, so as to prevent the operation of any of the hydraulic works usually propelled by such power, such
44 deduction shall be made from the rent accruing on such portion of the water-power as the said party is so prevented from using, as will bear the same proportion to the yearly rent thereof as the time during which the said party has been deprived of its use bears to eleven months. The rent, to commence on the first day of July, 1840, and to be paid semi-annually thereafter, on the first days of May and November in every year during the continuance of this lease, to such agent of the State as may be authorized by law to receive the same.

And it is further understood, that the necessary regulating weir, head-race, and trunk to conduct the water to the wheels, and the tail-race to pass it from the wheels, as above specified, are to be constructed by the party of the second part at his own expense, and according to the direction of the acting commissioner or engineer on this portion of the canal, and to be kept in good repair so as to prevent the waste of water.

It is further agreed, that the party of the second part, during the continuance of this lease, shall, at his own expense, keep constantly in good repair the race or trunk above described; and if any breach or other injury shall at any time occur to the canal in consequence of the race or trunk not being faithfully constructed, or being suffered

to be out of repair, or from any negligence of any person employed about the mills, then the said party of the second part shall forfeit and pay to the State the whole cost of repairing such breach or injury. And if the said party of the second part shall refuse or
45 neglect to rebuild, repair, or strengthen said regulating weir, or other works necessary to the security of the canal, after being notified in writing by the engineer, superintendent, or other proper agent of the State, that such renewal is necessary for the safety of the canal, such refusal or neglect shall subject the party of the second part to a forfeiture of this contract or lease, at the option of the acting commissioner or other agent of the State thereto duly authorized

It is expressly understood and agreed by and between the parties, that for the purpose of preventing or repairing breaches, removing obstructions to the navigation of the canal, or for the purpose of making any improvement in the canal, any authorized agent of the State may cause the water to be drawn out of the canal, to remain out so long as may be necessary. And the party of the first part further reserves the right to resume at any time the use of the water hereby leased whenever this shall become necessary for the purposes of navigation; and if it shall become necessary to resume the use of so great a portion of the water hereby leased, or of the whole thereof, for so great a portion of the time as to destroy the value of the privilege, (which fact shall be determined by three judicious disinterested freeholders, one to be chosen by the acting commissioner or other authorized agent of the State, one by the party of the second part, and the third by the two thus chosen,) then the party of the second part shall be absolved from such time from all further liabilities growing out of this agreement, and shall also receive
46 such compensation for his improvements as the said freeholders may consider their fair value.

It is further agreed, that at the expiration of the term of this lease the acting commissioner, or other authorized agent of the State, shall give public notice that proposals will be received for the water privilege hereby leased for a like term of years, which notice shall require that each proposal be accompanied with an agreement on the part of the bidders to pay the party of the second part for all permanent and valuable buildings necessarily erected by said party of the second part for the use of the water, at such price as said buildings may be adjudged to be worth, by three judicious disinterested freeholders chosen as heretofore specified; provided such buildings shall be situated on lands belonging to the State, or which can be purchased by said bidder at a reasonable price to be determined by said appraisers; and said party of the second part shall thereupon be entitled to a renewal of this lease for a like term of thirty years, at such rent as may be offered by the highest responsible bidder. And if such bid shall be made on the terms aforesaid at a higher rent than is herein specified, then the party of the second part shall be entitled to a renewal on the terms of this lease, and said commissioner shall be authorized to extend or postpone the time of receiving proposals,

if he may deem this necessary to guard the interests of the State against fraudulent or unfair combinations.

And if at any time any instalment which shall become due for
47 rent shall remain unpaid for one month from the time it shall become due, or if the party of the second part shall in any respect violate or fail to comply with any of the stipulations contained in this agreement, then, and in either case, all the rights and privileges secured to said party by this agreement shall cease and determine, and any authorized agent of the State, or lessee under said State, shall have power to enter upon and take possession of the premises, and resume all the rights and privileges hereby granted to the party of the second part, and said party of the second part shall, moreover, be liable to pay for all damages consequent upon such violation of this agreement.

It is further understood and agreed, that said party of the second part shall not sell, assign, or transfer his right or interest derived from this agreement without consent, in writing, of some authorized agent of the State, nor shall the water-power hereby leased be applied to other purposes than that contemplated by this agreement without like authority.

It is also agreed that the position of the mills shall be fixed by the acting commissioner and engineer on this portion of the canal. The gearing shall be of such proportions that the periphery of the water-wheel, (if an overshot,) when the machinery is in operation, shall move at the rate of feet per second, and in all other respects the form of the wheel and other machinery shall be such as will be approved by the acting commissioner and engineer aforesaid.

It is further understood that the delays occasioned either by high water or by freezing will be at the risk of the party of the
48 second part, and no diminution of the rent shall take place on account of such delay.

And the said party of the first part, in consideration of the rents and agreements hereinbefore specified, further agrees to lease to the party of the second part, upon the same conditions, and subject to the same limitations and restrictions herein contained, such part of the ground belonging to the State at the point above named, as, in the opinion of the engineer having charge of that portion of the canal, may be necessary to the use of the water-power hereby leased, for the like term of thirty years, from the first day of January, 1840, the particular portion of ground to be staked off and designated by said engineer, to wit: A strip of land forty feet wide, bounded on the north by the top water line of the northern arm of the lower mill basin; on the south, by a line parallel and forty feet south of the northern boundary; on the west, by the top water line of the lower basin; and on the east, by the top water line of the upper basin, reserving for the purposes of a public highway, both from the east and west ends of said lot, a strip twenty-five (25) feet wide and forty feet long.

Inasmuch as there is at present a large surplus of water necessarily passed over the upper tumble for the supply of the mills below, which will probably not be required for some two or three years, it is agreed

that the party of the second part, as a temporary arrangement, may use a spiral vent wheel for the term of three years from the date of this contract, upon the express condition, however, that at the end of that period, the spiral vent wheel is to be taken out and the
49 overshot wheel put in according to this contract, and a failure to comply with this requirement within six months of the time named is to work a forfeiture of this lease. And with a view to this change of the wheels, the mill-house is to be erected in such manner as that the overshot wheel may be substituted without removing or materially changing the mill.

N. NOBLE,
Act. Com'r N. Div. Cut. Canal.
WM. SHEETS.

To the introduction of which as evidence the defendant, by his counsel, excepted, because the said instrument is not a deed on the part of the State of Indiana, nor a demise under seal of the premises therein described, there being no seal, public or private, affixed to either of the signatures; and because, by the supposed sale of the State's interest in the northern division of the central canal, under the acts of the legislature authorizing such sale, neither the purchasers nor their assigns acquired such title in the demised premises as to entitle them to enter as for a forfeiture of the lease for the non-payment of rents therein reserved; but the court overruled the objection and permitted the lease to be read as evidence, to which overruling of said objections by the court, and permitting the lease to be read as evidence, the defendant by his counsel excepted, and had leave to file his bill of exceptions, which is now done, signed, sealed, and made a part of this record.

S. H. TREAT. [SEAL.]

50 *Exception No. 5.*

Be it remembered, that on the trial of this cause, at the July term, A. D. 1862, of this court, the lessors of the plaintiff introduced the following evidence to prove a demand of the rents claimed by the lessors of the plaintiff to have been demanded by them on the first day of May and the first day of June, 1860, for the demised premises in each of the leases mentioned.

David McDonald, esquire, being called as a witness and sworn, stated that he was, at the times referred to in his testimony, the senior member of the law firm of McDonald & Walker, of the city of Indianapolis, in the State of Indiana, which firm was composed of himself and Charles N. Walker. That the witness and his partner had been retained by the lessors of the plaintiff in their law matters generally; and that at their law office, between the first of November, 1859, and the first of May, 1860, the witness and his partner were particularly requested by the lessors of the plaintiff to make such a demand of the rents that would fall due on the first of May, 1860, as that a forfeiture of the leases might be claimed and enforced, if the rents should not be paid. That the witness, accompanied by Mr. Woodruff, one of the plaintiffs, and Mr. Gay, their general

agent, on the evening of the first of May, 1860, a little before sundown, a fourth or a half or three-fourths of an hour before sundown, went on the demised premises, first going to the paper mill, which was on the premises leased to Yandes & Sheets, and standing in the outer door of the mill, the defendant not being present, and the door being closed, he demanded, in the name of his principals, the rents
51 which had accrued according to the lease, between the first day of November preceding and the first day of May then present, amounting to $220 96; that there being no person present to respond to the demand, they repaired to the other premises, at what is called the upper tumble, being the premises covered by the lease to the defendant, where a like demand was made by the witness in the name of his principals for the sum of $110 48, being for rents for the same period of time for the last mentioned premises. That the latter demand was also made in the most notorious place on the premises, a few minutes after the first; and there was no one present except those who went with him to witness the demand. That he was not present when the demand was made on the first of June, which was made by his partner, Mr. Walker; that the last named premises—that is, those at the upper tumble—seemed to have been deserted for some time theretofore, and were then unoccupied, and that the premises on which the paper mill stands were then unoccupied, no person being there, the mill being shut, and not then in operation, because, as the witness supposed, the water had been and then was drawn off the canal for the purpose of repair by the lessors of the plaintiff.

It is admitted for the purposes of this trial that the demands made on the first day of May, 1860, and the first day of June, 1860, were for the right sums under the leases; but this admission was and is made only to be used in this present case, the defendant denying that water was furnished him for the period according to the
52 leases.

Alfred Gay, a witness for the lessors of the plaintiff, testified that he was present at the times and place of the demands testified above by the witness McDonald, and that the circumstances of the demands, as testified to by McDonald, are, according to the recollection of said Gay, correct. Said Gay further testified that he and Charles W. Walker went to the premises in question afterwards, to make like demands. That said Walker made demands in the same manner as those previously made by said McDonald, and for the same sums, on the most public place on said premises respectively, at the front door of the building, on each of said premises, said buildings being then shut up, and no one being on either of them, neither the defendant nor any other person, at the time. That said demands were made in the afternoon, and before sundown, and, as the witness thought, on the 30th or 31st day of May, 1860. (Here it was agreed that the last mentioned demands referred to by the witness were made on the first day of June, 1860.) And in answer to the question whether it was after sundown, or before, put to him by the plaintiff's counsel—which was objected to by the defendant's counsel, as being a leading question—the witness answered, it was before sundown.

On cross-examination, the witness stated that the demands made by Walker were in the afternoon of the day, but he could not
53 tell how long before sundown, nor what hour.

The witness further testified, that some days before either of the demands were made by said McDonald and Walker, the water had been drawn from the canal by the lessors of the plaintiff to repair it, and remained out till in July or August; that whilst the water remained out the paper mill was closed, and there was no one about the premises; and that all the property was in the same condition when each and all of said demands were made—that is, there was no one on the premises.

And the foregoing is all the evidence given on the subject of demanding rents.

The Hon. Henry R. Selden, one of the lessors of the plaintiff, produced by them as a witness to prove the authority of Messrs. David McDonald and Charles M. Walker to make demand of the rents, testified as follows:

That in November or December, 1859—thinks it was the latter month—he was in the law office of McDonald & Walker, in Indianapolis, those gentlemen, (David McDonald and Charles M. Walker,) together with the witness, co-plaintiffs in this suit, Woodruff, and Paine, being present.

That Messrs. McDonald and Walker had been previously retained by the plaintiff, in their law business generally, at Indianapolis. On consultation, it had been concluded by the plaintiff to adopt legal measures to collect from the defendant the rents due by him
54 under his leases from the State, and at the time referred to Messrs. McDonald and Walker were requested to make formal demand, upon the premises, of the rents that would fall due on the first day of May following, and if not paid to enter for a forfeiture of the leases and bring suit to recover possession; that the authority thus conferred was verbal altogether, and no written authority to make demand was ever given to Messrs. McDonald and Walker, or either.

The foregoing testimony of Judge Selden, and that of Judge McDonald above stated, was all the testimony given, tending to prove the authority of Messrs. McDonald and Walker to demand rent from the defendant.

It is admitted by the lessors of the plaintiff, in open court, for the purpose of making the admission a part of the record, without other proof, that the matters in dispute in this suit exceed the sum and value of two thousand dollars, and it is accordingly so found and ordered by the court.

And to the admission of the said testimony of said several witnesses to prove the demand of rents, and to the authority to make such demand, the defendant at the proper time objected, but the court overruled the objections; to which the defendant excepted, and had time given him to file his bill of exceptions, which is now done, signed, sealed, and made a part of the record.

S. H. TREAT. [SEAL.]

55 *Exception No. 6.*

Be it remembered, that on the trial of the above-entitled suit, on the twelfth judicial day of the July term of said court, and after the testimony was closed and the arguments of counsel heard, and before the jury retired from the bar to consult of their verdict, the defendant, by his counsel, moved the court to instruct the jury as follows:

1st. That the defendant being in possession of the premises at the time of the commencement of this suit, under the leases from the State of Indiana which have been produced in evidence by the lessors of the plaintiff, and they claiming title under purchasers who bought from the State by virtue of acts of the legislature of the State, approved 19th January, 1850, and 21st January, 1850, they (the lessors of the plaintiff) cannot recover if the demises by the State were not by deed.

2d. That the lease to Daniel Yandes and William Sheets (the defendant) not being sealed by the State seal nor any other seal, except by an ink scrawl appended to the signature of D. H. Maxwell, (president of the Board of Internal Improvement,) thus: "D. H. Maxwell, Pres't B'd Int. Imp. [SEAL.]"—it is not a sealing by the State.

3d. That the leases contain no stipulation for the payment of rent for the lands demised, the rents reserved being for the use of the "water" purely, or the "water power;" therefore,

4th. The lessors of the plaintiff are not grantors or assignees of the reversion of the premises described in the leases, the State never having yet parted from her legal title thereto.

56 5th. The instrument in writing purporting to be a deed of conveyance, or "Indenture made this thirtieth day of June, in the year of our Lord one thousand eight hundred and fifty-one, between Joseph A. Wright, governor of the State of Indiana, and Erastus W. H. Ellis, auditor of said State, of the first part, and Francis A. Conwell of the second part," is not a conveyance by the governor, in the name of the State of Indiana, of the premises described in the leases, in pursuance of the powers conferred by the laws of Indiana, so as to vest the grantee and his heirs and assigns with the right to enforce the conditions of the leases, or to enter for non-payment of rent, or for any other breach of the conditions as against the defendant.

6th. The demand of the rent falling due on the first day of May, 1860, made on the first day of June, 1860, was too late. To constitute a valid demand to enforce a forfeiture of the leases, it should have been made on the 31st day of May, 1860, at the very latest.

7th. The demand of such rent on the premises, by Walker, on the 1st day of June, 1860, was not a valid demand to establish a forfeiture of the leases, because it was made neither by the lessors of the plaintiff in person, nor by any agent properly authorized, nor in the proper form.

8th. A demand, on the premises, of the rent on the day it became due, made to establish a forfeiture of the leases, must have been made

by the lessors of the plaintiff in person, or by an agent properly authorized.

57 9th. A member of the law firm of Messrs. McDonald & Walker, of Indianapolis, although such firm were the attorneys and counsellors of the lessors of the plaintiff in this suit, as well as in other law business, and although said firm were verbally authorized and instructed by the said lessors to make such demand for the half-year's rent falling due 1st May, 1860, for the express purpose of establishing a forfeiture of the leases if the rents should not be paid, was not an agent properly authorized to make a demand for such purpose, unless it is also proved that the defendant was fully informed of such authority before or at the time of the demand, or that the fact of such verbal authority was audibly announced by the person professing to act as agent in making such demand, on the premises.

10th. The fact that the defendant was not on the premises, or on either of them, on the first day of June, 1860, when the demands were made by Walker, nor present to hear them, did not dispense with any part of the form of demand, nor the substance of it, which would have been material to observe had the defendant been present to hear it.

11th. That neither of the leases in evidence contains any stipulation on the part of the lessees for the payment of rent for the lands demised; and the rents reserved being for the use of the water, or the water power; ejectment will not lie for the lands for a failure to pay said rents.

58 12th. The lessors of the plaintiff are not the grantees or assignees of the reversion in the premises described in the leases respectively, in virtue of titles derived from or under those who became the purchasers, by virtue of the acts of the legislature of the State of Indiana, unless the instrument executed by "Joseph A. Wright, governor," and "Erastus W. H. Ellis, auditor of state," bearing date 30th June, 1851, as parties of the first part, to Francis A. Conwell, as party of the second part, is such a conveyance of the State's interest in the demised premises, as was authorized and required by the provisions of the acts of the legislature on that subject.

13th. That said instrument (a copy of which was received as evidence) is not such a conveyance, and therefore the State yet holds the legal title.

14th. That said instrument is not a conveyance "on behalf of the State, in the name of the State."

15th. That said instrument is not a conveyance of all the right, title, interest, claim, and demand which the State then had and held in the premises which the instrument assumes and purports to convey to said Francis A. Conwell, his heirs and assigns.

16th. That said instrument is inoperative as a deed of conveyance, it not being executed by the governor "on behalf of the State, and in the name of the State."

17th. That purchasers through or under Conwell did not acquire a

legal title to the premises; hence the lessors of the plaintiff
59 cannot maintain this suit as such purchasers.

18th. That if, as such purchasers, the lessors of the plaintiff thereby became the assignees of the reversion in part only of the lands demised, they cannot maintain this suit.

19th. The lands demised did not pass by the supposed grant from the State.

20th. At most, only so much thereof as falls within the following description did pass, viz: "All the right, title, interest, claim and demand which the State might hold or possess in the northern division of the central canal, north of Morgan county, and all the rents that might or should have become due after the sale of said property, and the water power and appurtenances thereunto belonging, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water power, structures, and all the appurtenances thereunto belonging;" and there being no testimony or evidence, other than the said description, to prove that the premises demised by the leases come within the description, the jury cannot say the State's sale included all that was so demised.

21st. The jury are not authorized to determine that the sale by the State was intended to embrace all that the State had so demised, without the production of some evidence on that point.

22d. Inasmuch as, by the law, land cannot be appurtenant to land, therefore the lands demised would not pass, and did not pass, to Conwell as "appurtenant" to the northern division of the central
60 canal, north of Morgan county, or as appurtenant to the bed of the canal, nor as appurtenant to its banks, nor its margins, nor its tow-paths, nor its side-cuts, nor its feeders, nor its basins, nor the right of way, nor the dams, nor the water power, nor the structures mentioned and described in the acts authorizing the sale, and in the instrument purporting to convey those things to Conwell.

23d. There was no act of the legislature of the State of Indiana in force when the canal and its appurtenances were sold by State authority, which gave the purchasers, or their assignees, a right to enter upon the premises leased by the State to the defendant, or on those leased to defendant and Daniel Yades, and to claim a forfeiture of the leases for non-payment of rent due under those leases.

24th. No act has been since passed by said legislature conferring such right, which is in force at this time.

25th. The testimony adduced by the plaintiffs, and in evidence, did not prove such a demand of the rents on the 1st day of June, 1860, as would authorize the lessors of the plaintiff to consider the leases as forfeited for the non-payment of rent.

Which said several instructions, and each one of them, the court refused to give; to which refusal by the court the defendant by his counsel at the time excepted, and had time given him to file his bill of exceptions, which is now done, signed, sealed, and made
61 a part of the record.

S. H. TREAT. [SEAL.]

Exception No. 7.

Be it remembered, that on the trial of the above-entitled suit, on the twelfth judicial day of the July term of said court, after the testimony was closed and the argument of counsel heard, and before the jury had retired from the bar to consult of their verdict, the court instructed the jury as follows, to wit:

1st. The evidence shows that the lessors of the plaintiff acquired title to the premises in dispute, on the 30th of Nov., 1859; and that they are entitled to recover possession of the same, if the defendant has forfeited his rights under the leases in evidence.

2d. The lessors of the plaintiff also insist that defendant has forfeited his rights under the leases, by a failure to pay the rent reserved for the 6 months ending on the 1st of May, 1860.

3d. The leases provide in substance, that if any instalment of rent shall remain due for one month from the time it shall become due, all the rights and privileges of the tenant shall cease and determine, and the landlord shall have power to enter upon and take possession of the demised premises.

4th. In order to insist upon a forfeiture under this provision, it was incumbent on the lessors of the plaintiff, by themselves or their authorized agents, to have entered upon the demised premises on the last day for the payment of the rent, and there, in the most
62 public place on the premises, and at a convenient hour of the day before sunset, in an audible voice, have demanded payment of the precise amount of the rent due for the 6 months.

5th. A failure of the defendant to make payment on such a demand would authorize the lessors of the plaintiff to consider the tenancy as at an end, and bring ejectment to recover possession of the demised premises.

6th. If the jury believe, from the evidence, that the rent for the 6 months ending on the 1st day of May, 1860, was due and unpaid on the 1st day of June, 1860, and that such a demand for payment thereof was made by the lessors of the plaintiff on the latter day, and that payment was not made, the plaintiff is entitled to recover.

To which several instructions by the court, and to each of them, the defendant excepted at the time, and had time to file his bill of exceptions, which is now done, signed, sealed, and made a part of the record.

S. H. TREAT. [SEAL.]

Exception No. 8.

Be it remembered, that on the trial of the above-entitled suit, on the twelfth judicial day of the July term of said court, and on the return of the verdict of the jury into court, the defendant, by his counsel, moved the court to set aside the verdict and grant a new trial, and filed the following reasons therefor, to wit:

1st. That the verdict is contrary to law.

2d. That the verdict is contrary to the evidence.

63 3d. That the court erred in the instructions given to the jury.

4th. The court erred in refusing the instructions prayed for by the defendant's counsel.

But the court overruled the motion for a new trial; to which opinion of the court overruling the motion the defendant at the time excepted, and had time given to file his bill of exceptions, which is now done, signed, sealed, and made a part of the record.

S. H. TREAT. [SEAL.]

And afterwards, to wit, on the same day and year last aforesaid, at the circuit court begun and holden as aforesaid, before the honorable judge aforesaid, and now comes the defendant, William Sheets, by his attorney, and exhibits to the court a writ of error in this suit from the Supreme Court of the United States, directed to the judges of this same court, returnable to the first Monday of December next, and he lodges a copy thereof now in the clerk's office of this court, in pursuance of the statute of the United States in such case made and provided, for the above-named Henry R. Selden, Harman Woodruff, and Nicholas E. Paine, which is in the words and figures following, to wit:

Copy of writ of error for def'ts.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the seventh circuit and district of Indiana:

64 Because in the record and proceedings, and also in the rendition of a judgment in a plea which is in the said circuit court before you, between John Doe, on the demise of Henry R. Selden, Harmon Woodruff, and Nicholas E. Paine, plaintiff, and William Sheets, defendant, a manifest error hath happened, to the great damage of the said William Sheets, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be there given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of said Supreme Court of the United States, this 1st day of August, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh year.

(Signed) JNO. H. REA, *Clerk.*

65 And the said defendant, Sheets, also presents to the court and files a bond with Robert Browning as security, in the penalty of three thousand dollars, conditioned that said Sheets shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, which bond, being approved by the court, and the writ of error allowed, a citation is now issued by his honor the judge, requiring said Selden, Woodruff, and Paine to appear at said Supreme Court of the United States on the said first Monday of December next, to show cause why the judgment aforesaid should not be corrected, which bond is in the words and figures following, to wit:

Copy bond to prosecute writ of error.

Know all men by these presents, that we, William Sheets and Robert Browning, of the county of Marion in the State of Indiana, are held and firmly bound unto Henry R. Selden, Harmon Woodruff, and Nicholas E. Paine, of the State of New York, in the sum of three thousand dollars, to be paid to them jointly, or either of them severally, or their heirs, executors, or administrators. To which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals and dated this 1st day of August, A. D. 1862.

Whereas the above bound William Sheets has prosecuted to
66 the circuit court of the United States for the seventh circuit and district of Indiana a writ of error to reverse a judgment of the said circuit court lately rendered in a cause wherein John Doe, on the demise of said Selden, Woodruff, and Paine were plaintiffs, and said Sheets was defendant:

Now, therefore, the condition of this obligation is such, that if the above bound William Sheets shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

WM. SHEETS, [L. S.]
R. BROWNING. [L. S.]

Approved August 1st, 1862.

S. H. TREAT, *Dist. Judge.*

And said citation is in the words and figures following, to wit:

Copy of citation.

UNITED STATES OF AMERICA, *ss:*

To Henry R. Selden, Harmon Woodruff, and Nicholas E. Paine, greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the circuit

court of the United States for the seventh circuit and district of Indiana, wherein William Sheets is plaintiff, and John Doe, on your demise, is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not
67 be corrected, and speedy justice should be done to the parties in that behalf.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this first day of August, in the year of our Lord one thousand eight hundred and sixty-two.

S. H. TREAT. [L. S.]

Writ of error, (original.)

68 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the seventh circuit and district of Indiana, greeting:

Because in the record and proceedings, and also in the rendition of a judgment in a plea which is in said court before you, between John Doe, on the demise of Henry R. Selden, Harmon Woodruff, and Nichlas E. Paine, plaintiff, and William Sheets, defendant, a manifest error hath happened, to the great damage of the said William Sheets, as by his complaint appear; and it being fit that the *the* error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be there given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in
69 the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this first day of August, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh year.

[SEAL.] JNO. H. REA, *Clerk.*

71 Filed August 1st, 1862.

JNO. H. REA, *Clk.*

Citation, (original.)

72 UNITED STATES OF AMERICA, *ss:*

To Henry R. Selden, Harmon Woodruff, and Nicholas E. Paine, greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the

Circuit Court of the United States for the seventh circuit and district of Indiana, wherein William Sheets is plaintiff, and John Doe, on your demise, is defendant in error, to show cause, if any there be, why the judgment in the same writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this first day of August, in the year of our Lord, 1862.

S. H. TREAT. [SEAL.]

73 Due service of the within citation is hereby acknowledged, a copy thereof, and all other prescribed formalities being hereby waived.

Nov. 11, 1862. DAVID McDONALD.
Att'y for Def't in Error.

75 Filed August 1st, 1862.

JNO. H. REA, *Cl'k.*

76 THE UNITED STATES OF AMERCA,
District of Indiana, set.:

I, John H. Rea, clerk of the circuit court of the United States within and for the seventh judicial circuit and district of Indiana, do hereby certify the above and foregoing to be a true and complete transcript of the record, proceedings, and judgment in the above-entitled cause, and that the writ of error and citation hereto annexed are the original writs issued in said cause. All of which now remains of record in my office.

In testimony whereof, I have hereunto set my hand and *and* affixed [SEAL.] the seal of said court at the city of Indianapolis, this 4th day of November, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States of America the eighty-seventh.

[SEAL.] JOHN H. REA, *Clerk.*

77 In the Supreme Court of the United States.

JOHN SHEETS
vs.
JOHN DOE, on the demise of HENRY R. SELDEN, HARMON WOODRUFF, and NICHOLAS E. PAINE. } In error.

Comes now into the said Supreme Court the said William Sheets, by James Morrison, his attorney, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid there is manifest error, in this, to wit: that by the record aforesaid, it appears that the judgment aforesaid was given for the said Henry R. Selden, Harmon Woodruff, and Nicholas E. Paine, against the said William Sheets, whereas by the law of the land the said judgment ought to have been given for the said Sheets against the said

Selden, Woodruff, and Paine, and there was also error in the following particulars, to wit:

1st. In the overruling of defendant's motion for a new trial, for the causes specified in the motion.—(Record, page 25.)

2d. In overruling the defendant's motion to strike out and reject the 20th paragraph of the bill of particulars of the lessors of the plaintiff, for the cause specified.—(*Ib.*, p. 26.)

3d. In overruling the defendant's motion to strike out and reject the 3d paragraph of the said particulars.—(*Ib.*)

4th. In overruling the defendant's motion to strike out and reject the 4th paragraph of the said particulars.—(*Ib.*)

78 5th. In overruling the defendant's objection to the introduction, as evidence, of the instument in writing, purporting to convey the State's interest in the canal, &c., to Francis A. Conwell, for the causes specified.—(Record, pages 27 to 31.)

6th. In overruling the defendant's objection to the introduction, as evidence, of lease from the State to Daniel Yandes and William Sheets, for the causes specified.—(*Ib.*, pages 32 to 40.)

7th. In overruling the defendant's objection to the introduction, as evidence, of the lease from the State to William Sheets, for the cause specified.—(*Ib.*, pages 41 to 49)

8th. In overruling the defendant's objection to the testimony of McDonald and Gay and Selden, as to the demand of the rents, and also, as to the authority to make such demand.—(*Ib.*, pages 50 to 5 .)

9th. In overruling the instructions to the jury, requested by the defendant, all and each.—(*Ib.*, pages 55 to 60.)

10th. In the instructions given to the jury.—(*Ib.*, pages 61, 62.)

And the said William Sheets prays that the judgment afore-
79 said, for the errors aforesaid, and other errors in the said record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

J. MORRISON,
Attorney for Plaintiff in Error.
LUCIAN BARBOUR,
of Counsel for Plaintiff in Error.

Filed 15th Dec., 1862.

13 Cal 496

SUPREME COURT OF THE UNITED STATES.

No. 210.

WILLIAM SHEETS, PLAINTIFF IN ERROR,

v.

LESSEE OF HENRY R. SELDEN, HARMON WOODRUFF AND NICHOLAS E. PAINE.

In Error to the Circuit Court of the United States for the District of Indiana.

ARGUMENT FOR THE DEFENDANT IN ERROR.

S. F. Wetmore, Pr., 37 East Washington St.

1823

IN THE SUPREME COURT

OF

THE UNITED STATES.

WILLIAM SHEETS

vs.

JOHN DOE EX DEM. SELDEN ET AL.

IN ERROR TO THE U. S. CIRCUIT COURT FOR THE DISTRICT OF INDIANA.

ARGUMENT FOR THE DEFENDANT IN ERROR.

In 1839 and 1840, the State of Indiana was the owner of the Northern Division of the Central Canal, which passes through the city of Indianapolis, and of certain adjacent lands. The canal afforded surplus water power in and near the city. An act of the Indiana Legislature authorized the Board of Internal Improvement "to cause such surplus water, with such portions of ground belonging to the State as might be necessary to its use, to be leased." Code of 1838, p. 346. Under this act, a lease was made to Daniel Yandes and the plaintiff in error, February 12, 1839, and a lease to the plaintiff in error, January 1, 1840. These leases were each for the term of 30 years. They reserved certain rents payable semi-annually on the first of May and November, and provided that if any rent should "remain unpaid for one month from the time it shall become due," "all the rights and privileges" of the lessees "shall cease and determine, and

any authorized agent of the State, or lessee under the State, shall have power to enter upon and take possession of the premises," &c. These leases are copied into the record.

Under two acts of the Legislature, the Governor sold so much of the canal, land, and water power as is embraced by said leases. Acts of 1850, pp. 21, 22.

The Legislature, by a joint resolution, approved said sale, and directed the Governor to convey the property, "as sold by him, to the purchasers, their heirs, or assigns." Acts 1851, pp. 200, 201.

The purchasers assigned their contract to one Francis A. Conwell; and the Governor, in accordance with said joint resolution, on the 30th of June, 1851, conveyed the land and canal to Conwell. Through several intermediate conveyances, the lessors of the plaintiff became the owners of this property.

Afterwards the plaintiff in error, being in possession under said leases, and having refused for several years to pay rent, the lessors of the plaintiff below formally demanded, on the premises, the rents falling due on the first day of May, 1860. The plaintiff in error having failed to pay the rents, the lessors of the plaintiff claimed that he thereby forfeited his leases; and they instituted this action of ejectment to recover the possession of the property. He entered into the consent rule and pleaded not guilty; and on a trial at the May Term, 1861, of the Court, there were a verdict and judgment for the plaintiff below. But the Court supposing that a certain statute of Indiana, hereafter to be more fully noted, required a new trial, as of course, in all such cases, set aside the judgment and verdict, and ordered a new trial.

In July, 1862, another trial was had. There were again a verdict and judgment against the plaintiff in error.

We have assigned a cross-error, which, if decided in our favor, will save this Court the labor of further investigating the case. We complain that the Circuit Court

erred in setting aside the first verdict and judgment, and in ordering a new trial.

The Indiana Code of practice of 1852 abolishes the action of ejectment, and provides that a judgment, in an action to recover lands, so long as it remains in force, shall be conclusive of the title; but, in mitigation of the rule, allows a new trial, as of course, on payment of all costs, if it be applied for within a year after the rendition of the judgment. At the time when the new trial was ordered, this provision of the Code had not been adopted by the Court which tried this cause. The rules of the common law governing the action of ejectment, unaffected by any statute, were the law of the Court.

A bill of exceptions shows that we excepted to the ruling in setting aside the judgment. And it shows that the "motion was based on the provisions of Section 601 of Article 29 of the second volume of the Revised Statutes of Indiana *alone*." 2 R. S. 1852, pp. 166, 167.

The bill of exceptions, too, states the reason on which the Court proceeded, namely, because the Court had "stated to counsel for the defendant before entering upon said trial, that under the former ruling of the Court in a similar case upon the statute above referred to, said defendant would be entitled to another trial if the verdict should be against him, and the defendant having entered into trial with that express understanding, and averring that otherwise he would file an affidavit for a continuance—and the plaintiff at the same time objecting thereto."

We submit that all this was wrong, because,

1. The Court ought never to make such a promise to a defendant before hand.

2. The Indiana Code of practice does not, and ought not to, govern the practice of the United States Court.

3. The aforesaid provision of the Indiana Code, even if it were the law in the United States Court, has no application to an action of ejectment, which, by that very

Code, is abolished. The reason of that provision of the Code undoubtedly was, that, as the final judgment in the action thereby given was made conclusive, the Legislature thought proper to allow one new trial, as of course, to compensate for the common law right to try the title in actions of ejectment as often as a party pleases.

We are aware of the rule in the Federal Courts, that the granting or refusing of a new trial is matter of discretion which cannot be assigned for error in this Court. But the point in question is not within that rule. For, in the first place, here was no exercise of a discretionary power; the Court professed to act and be bound by said section of the Code alone. And, in the second place, here was not the case of merely setting aside a verdict and ordering a new trial, but of setting aside a final judgment.

We will now proceed to examine the points urged by the plaintiff in error for a reversal of this judgment.

I. It is said that the deed by the Governor to Francis A. Conwell is void.

This objection is urged on the ground that the deed, on its face, does not purport to have been made by the State, but by the Governor and Auditor of State.

It is true that it is not so formal a conveyance of the State's interest as a careful lawyer would be likely to draw; but it sufficiently shows the intent to convey, not the interest of the Governor and Auditor, but that of the State, in the property; and this is enough. That this is true, the following facts show:

1. It recites the acts and joint resolution above referred to, authorizing and approving the sale, and purports to be made "in pursuance" of their provisions.

2. It expressly states that said officers offered for sale, and thereby sold and conveyed "all the right, title, interest, claim and demand, which the State held" in said property.

3. It is fairly inferable from the deed that the Governor

and Auditor in making it acted as the agents of the State.

4. It was executed under the seal of the State.

Even between private parties this would be a good conveyance of the interest of the principal by his attorney. Combe's Case, 9 Co. 75; Devol v. Halstead, 16 Ind. R. 288.

But the case is much stronger in our favor, when the transaction, as in this case, is by a public officer, acting under a public statute. Indeed, "it is too clear to be controverted that where a public agent acts in the line of his duty and by legal authority, his contracts on account of the government are public, and not personal. They inure to the benefit of, and are obligatory on the government." Hodgson v. Dexter, 1 Cranch 345. In that case a lease made "to Samuel Dexter, Secretary of War," was held to be, in law, a lease to the government. This case seems to us exactly in point; but we cite, to the same effect, Jones v. Le Tombe, 3 Dal. 384; Macbeth v. Haldimand, 1 T. R. 172; Walker v. Swartwout, 12 Johns. R. 444.

But all doubt on this point is removed by a subsequent act of the Legislature, which declares that "the right, title and interest of the State in and to" the property in question, "was sold and conveyed to Francis A. Conwell," "and all the rents that should become due after the sale of said property." This is recited in the act of March 9, 1859, (Acts of 1859, p. 167); and it binds the State; and as the question of the validity of the deed to Conwell is between him and those holding under him, on the one part, and the State, on the other, only, it is not for the plaintiff in error, at this late day, to contest the validity of the said conveyance.

It is not important whether this act operates as an estoppel or as evidence of title only. In either case it certainly shows, in connection with the conveyances in proof, that the title to the premises in dispute is in the lessors of the plaintiff.

Under the constitution of Indiana this act is a public statute, and it was, therefore, unnecessary that it should be offered in evidence. Constitution, Art. 4, Sec. 27.

II. It is urged that the lessors of the plaintiff, being at most but assignees of the reversion, cannot take advantage of the breach of the covenants in the leases to pay rent, so as to maintain ejectment for those breaches.

The plaintiff in error admits that if these leases were specialties this objection would not be tenable. But he insists that by the common law the assignee of the reversion could not enter for breach by the lessee of a covenant in the lease; and that the statute of 32 H. 8, c. 34, which has been in force in Indiana more than forty years, applies only to leases under seal. And he argues that the leases in question are not under seal, and are, therefore, not within that statute.

We suppose that the construction thus given to the statute of 32 H. 8 is right. The reason why that act has been so construed is that it gave the right to assignees of the reversion against lessees, only "for not performing conditions, covenants, and agreements expressed in *the indentures of leases and grants.*" And this phrase, *ex vi termini*, confined the statute to sealed leases. This construction of the statute of 32 H. 8 is not, however, decisive of the question under consideration, for the following reasons:

1. One of these leases—that made to Sheets and Yandes—*was under seal*. A bare inspection of the record shows this. All the parties to it sealed it; and if even Maxwell, the President of the Board of Internal Improvements, by adding his private seal, did a nugatory act, still as the lessees sealed it, their engagement in it to pay rent was, by their seals, a *covenant* to pay rent, and brought them within the very letter of the statute of 32 H. 8. The act authorizing these leases never contemplated a sealing on the part of the State. R. S. 1838, p. 346. It authorized the board of Internal Improvements

to make the leases. This Board had not the custody of the seal of State. The Secretary of State alone had that.

The statute last cited authorizes said Board to "lease"; but the word lease does not necessarily suppose a sealed paper, as do the terms deed, indenture, covenant; for there may be parol leases.

2. The act authorizing the Governor to sell the property transfers to the purchaser in this case the right to avail himself of the breaches of the engagements to pay rent, whether the leases were under seal or not. Laws of 1850, p. 21. The third section of that act authorizes the Governor "to sell all the right, title, and interest of the State of Indiana in and to the Northern Division of the Central Canal, and all the *rents* which shall become due after the sale of said property." And the deed to Conwell conveys to him, *inter alia*, "all the *rents* which may have become or shall become due, after the sale of said property." We submit that a fair construction of this act and this conveyance, carries to the grantee of the reversion all the remedies on the covenants to pay rent which, before the conveyance, the State had. If the assignee of the reversion could not enter for covenant broken, he could not sue therefor; for by the common law he could do neither, and it is not to be supposed that the statute meant to transfer the rents and not to transfer also the remedies provided by the law and by the leases in regard to the rents.

3. But the conclusive answer to the objection under consideration, is, that a general statute of Indiana alters the rule of the statute of 32 H. 8, by extending the remedies therein given to all leases. It enacts that—

"The alienees or grantees of any demised lands, tenements, rents, or other hereditaments, or of the reversion thereof, and assignee of the lessor of any demise, and the heirs and personal representatives of such alienee, grantee, or assignee, shall have the same remedies, by action or otherwise, for the non-performance of any

agreement contained in the lease so assigned, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture, as their alienor, grantor, or lessor had, or might have had, if such estate, interest or reversion had remained in such alienor, grantor, or lessor." R. S. 1843, p. 442.

This statute contains no words and no phraseology which can fairly confine its operation to leases under seal.

On the contrary, it has carefully omitted the very words in the statute of 32 H. 8, which led to the limitation of it to specialties. As we have seen, the statute of 32 H. 8 uses the words "conditions, covenants, or agreements, expressed in the *indentures* of leases and *grants*." But the Indiana statute drops the words "covenants," "indentures" and "grants," and employs only the word "agreement" — thus, "any *agreement* contained in the lease." It is not sound reasoning, therefore, to say that the English and Indiana statutes are alike limited to sealed instruments.

Moreover, the statutes of 32 H. 8 has been constantly in force in Indiana for more than forty years, except so far as modified by Indiana statutes. See statutes of 1818, p. 308; Code of 1824, p. 256; Code of 1831, p. 330; Code of 1838, p. 398; R. S. of 1843, p. 1030; 1 R. S. of 1852, p. 352. If, then, the provisions above copied from the acts of 1843 amount to no more than those of 32 H. 8 already in force in Indiana, why did the Legislature pass said act of 1843, on which we rely? Can we suppose that by that act the Legislature did not intend to alter the law of the land as it before stood? Such a supposition is not creditable to the Legislature, and should not be indulged but on the most obvious reasons; and no such reasons exist here. The construction ought to be that by the act of 1843 the Legislature meant to enlarge, or at least to alter, the rule under the act of 32 H. 8; and this construction, in view of both the acts, is a fair one.

Besides, the importance attached to seals, has been

constantly decreasing ever since the time of Henry VIII. There is no sense in the notion that an ink scrawl is more solemn or authentic than a signature. The laws of Indiana now put an unsealed writing on the same footing as a sealed one. 2 R. S. of 1852, p. 90. And conveyances in fee are now good without a seal. Acts of 1858, p. 39. In view of this tendency to destroy the distinction between simple contracts and specialties, the reason for construing a statute of Henry VIII concerning leases as embracing only sealed leases, was much stronger than in giving such construction to an Indiana statute of 1843.

We are a little surprised that the plaintiff in error should cite in support of the ground he assumes on this question the provision of the R. S. of 1843, p. 418, which enacts that "no lease for more than three years from the making thereof shall be valid or effectual against any person other than the grantor, his heirs and devisees, and persons having notice thereof, unless it be made by a deed, recorded," &c. We suppose he claims that his leases are good, though he thinks they are not "by a deed." And surely, the act of 1843 giving rights to assignees of reversions applies to leases of less than three years, as well as more. But it is plain that the statute referred to by the plaintiff in error is only effective to make leases, not executed and recorded as therein required, void as against *subsequent bona fide purchasers.* And no question about such purchasers arises in this case.

It should be noted that the act of 1843, on which we rely as transferring all the rights of the lessor to the assignee of the reversion, and which we have copied above, has never been repealed. In the Revision of 1852, it was substantially reënacted in these words: "Alienees of lessors and lessees of lands shall have the same legal remedies as their principals." 2 R. S. 1852, p. 243.

III. We deny the assumption of the plaintiff in error, that the leases in question contain no stipulation for the payment of rent for the land demised; and that conse-

quently ejectment will not lie for the land, on account of the breach of the covenant to pay rent.

To sustain this point he assumes that the rent reserved was for the water power alone; we claim that it was for water power *and* for the land.

On this point the leases are both alike; and they must speak for themselves. They present two points for consideration:

1. The leases each provide that if "any instalment which shall become due for rent, shall remain unpaid for one month," &c., "then, and in either case, all the rights and privileges secured to said party by this agreement shall cease and determine, and any authorized agent of the State, or lessee under said State, shall have power to enter upon and *take possession of the premises*," &c. Printed transcript, pp. 19, 24.

Here is an express stipulation that if the rent remain unpaid a month, the lessor may enter and take possession of the *premises*, and consequently bring ejectment. The rule that ejectment does not lie for water, and the dictum that an entry for condition broken, must be on the premises, for which the rent claimed is due, have nothing to do with the question. We care not how the law stands on these points. Our case is this: The lessee engaged to pay certain rent; and if he failed for a month to do so, he engaged that his right, not only to the water power, but to the possession of the *premises* should be forfeited. Will the Court hold him to his agreement? or shall he be released from it on the assertion that he did not agree to pay rent *for the land?* We know of no law, either statute or common law, that will release him.

2. But we say that, upon a fair view of the leases, *he did engage to pay rent for the land.*

The first part of each lease does, indeed, say that "in consideration of the right to the use and occupation of *said water*," the lessee "agrees to pay to the State" the ernt. But the use of the water necessarily implies the

use of the land. The act authorizing these leases, provided that the Board of Internal Improvement should "cause such surplus water, with such portions of ground belonging to the State as might be necessary to its use, to be leased." Revised Code of 1838, p. 346. By law, then, as well as by common sense, an engagement to pay rent for the water power must necessarily include the land, on which the water power must be used. And the same statute forbade "water power to be leased, unless the ground on which it is proposed to be used, shall be the property of the State."

But in leases, as in statutes, we must look to the whole instrument in order to interpret parts of it. In so much of these leases as we have just cited, some difficulty might possibly arise on the point in question. There is, however, a subsequent provision in each lease, which must remove all doubt. It is this:

"And the said party of the first part, *in consideration of the rents and agreements hereinbefore specified*, further agrees to lease to the party of the second part, upon the same conditions, and subject to the same limitations herein contained, such part of the *ground* belonging to the State at the point above named as, in the opinion of the engineer having charge of that portion of the canal, may be necessary to the use of the water power hereby leased." Printed transcript, pp. 20, 24.

Now, as this clause of the lease expressly says that the land demised is "in consideration of the *rents* and agreements thereinbefore specified," how is it possible to maintain that the rent to be paid was for the use of the water only, and not, also, for the land, on which the water was necessarily to be used?

IV. The plaintiff in error denies that, even though the deed to Conwell is valid, it conveys the premises sued for in this action. We maintain that it does convey them.

The ground taken by him on this point is, that neither the language of the act authorizing the conveyance, nor

the language of the deed, includes the premises in dispute.

The two acts directing the sale describe the property to be sold, as "all the right, title, and interest of the State of Indiana in and to the Northern Division of the Central Canal, and all the rents, which shall become due after the sale of said property, and the water power and appurtenances thereunto belonging." Acts of 1850, pp. 21, 22, 23.

The third section of the first act provides that, on payment of the fourth of the purchase money, the Governor shall "execute and deliver to the said purchaser or purchasers a deed for the bed of the Northern Division of the Central Canal, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water power, structures, and all the appurtenances thereunto belonging."

The joint resolution already referred to, as approving the sale and directing a conveyance, employs the same language. Acts of 1851, pp. 200, 201.

The deed to Conwell, in describing the property conveyed, designates it as "all the right, title, interest, claim, and demand, which the State may hold or possess in the Northern Division of the Central Canal, north of Morgan county, and all the rents, which may have become, or shall become, due, after the sale of said property, and the water power, and the appurtenances thereunto belonging, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water power, structures, and all the appurtenances thereunto belonging." Printed transcript, pp. 15, 16.

The question, then, is, Did the deed to Conwell pass the lands in question? We insist that it did.

We concede that it is an old dictum that, in a deed, lands will not pass by the word appurtenances. But we maintain that taking that word, in the deed and in the acts cited, as mere surplusage, still there is enough left to carry the land in controversy.

The true doctrine is that, in the transfer of such property as this—a canal—water power—a mill—the deed, or will, describing it as such, *ex vi termini*, carries with it all the land necessary for the use of the property described and commonly used with it.

In Pennsylvania, where a "grist mill and the appurteances" were devised, it was decided that "by these words, everything necessary for the full and free enjoyment of the grist mill, and requisite for the support of the establishment, such as a dam, water, the race leading to the mill, a proper portion of *ground* before the mill for the unloading and loading of wagons, horses, &c., as used by the testator, would pass. For, without these appurtenances, the grist mill could not be used." Blaine's Lessees v. Chambers, 1 Serg. & Rawle 169. In this case the term "appurtenances" was held to pass land. And there is much reason for so holding in every case, where what is conveyed by express description is the principal thing, and where the adjacent land is secondary to it, yet necessary to its full enjoyment.

But, perhaps, Mr. Justice Story has best expressed the true doctrine on the point, in another case, where there was a devise of "a mill and its appurtenances." He says, "My opinion is that, by the devise of the mill and appurtenances, all the land under the mill, and necessary for the use of it, and commonly used with it, passed to the devisee"—"I do not proceed upon the ground that the land was a mere appurtenance to the mill, but that it was parcel thereof"—"I lay no stress whatever upon the words in the devise, 'with the appurtenances.' The land under the mill and adjacent thereto, so far as necessary to its use, and commonly used with it, passed by the force of the word 'mill.' It is not necessary, in order to pass lands, that they should be specially designated by that name. A grant of a messuage conveys all the lands within the curtilage thereof: so the grant of a house." Whitney v. Olney, 3 Mason R. 280.

So, in Indiana, it has been held that the devise of a "brick house" passed the lot on which it stood, 132 feet long by 82½ feet wide, though the brick house was only 73½ by 20 feet. Common Council, &c., v. The State, 5 Ind. R. 335.

In all these cases, the reasoning of the Courts proceeds on the ground that the land was not the principal thing, but was necessary to the enjoyment of the principal thing particularly described. The case at bar is within that reasoning. For the leases themselves state that such part of the ground belonging to the State, as may be "necessary to the use of the water power" thereby leased, is also leased to the tenants. And the leases, then, each proceed to describe the grounds by metes and bounds, as they are described in the declaration. It is, therefore, clear from the record that these parcels of land, for which we sue, were necessary to the full and free enjoyment of the water power, and had been commonly used for that purpose.

If it be said that the cases above cited are not cases of conveyances by deed, but of wills, we answer, that in modern times there is no difference between the rules of construing deeds and wills. The rule in all such cases is *cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit.* Greenleaf's Cruise, tit. 32, c. 21, s. 30.

V. The Circuit Court committed no error, touching the question of the demand of rent made in order to work a forfeiture.

The leases provided that the rents should be paid semi-annually on the first days of May and November.

They also provided that "if at any time any instalment that shall become due for rent shall remain unpaid for one month from the time it shall become due, or if the party of the second part shall, in any respect, violate or fail to comply with any of the stipulations contained in this agreement, then, and in either case, all the rights

and privileges secured to said party by this agreement shall cease and determine," and the State may enter, &c., for condition broken. Printed transcript, pp. 19, 24.

We do not admit that we were bound to make any demand of rent at all. We insist that as the rights of the lessees were to "cease and determine" on failure for a month to pay rent, it was like a limitation in a deed by which the estate ends without any action on the part of the reversioner.

But if on the foregoing point we are wrong, still there was no error, for the demand of rent was in all respects right.

1. The demand was made by duly authorized agents. The evidence is clear that the lessors of the plaintiff authorized the law firm of McDonald & Walker to make the demand.

But it is objected that the agents were not authorized by any writing. We deny that either by the common law or any statute of Indiana, a written authority was necessary. Story on Agency, ss. 45 to 56.

2. The demands were for the right amounts. The record shows that "it is admitted, for the purposes of this trial, that the demands made on the first day of May, 1860, and the first day of June, 1860, were for the right sums under the leases." Printed transcript, p. 26.

3. The demands were made on the proper days.

These demands were made both on the first day of May and on the first day of June, 1860.

It is conceded by the plaintiff in error that a demand on both these days was unnecessary. But he insists that June 1 was not the day to make the demand; that is, as we understand him, he insists that the only proper day for the demand was at the end of the month after the rent fell due, and that the first of June was not that day. He claims that the last day of a calendar month would have been the last day of May, but that the construction requires a lunar month, which would have required a still earlier demand.

We maintain that the last day of a calendar month would take it to the first day of June. The rent, it is admitted, fell due the first day of May; and the lease says if it "remains unpaid for one month from the time it shall become due," the forfeiture shall accrue. The last day of one month from the first day of May is, undoubtedly, the first day of June, the day on which we made the demand. Without reference to statutes, the settled rule in Indiana is that in counting time from a fixed day, we exclude the first day and include the last. Hathaway v. Hathaway, 2 Ind. R. 513. Swift v. Tousey, 5 Ind. 197. It should be observed that the phraseology here is "for one month *from* the time it shall become due." And it has often been held that *from* a date and *after* a date mean the same thing, and are both exclusive of the date. Barwick's Case, 5 Co. 90. Co. Lit. 46 b. 1 Ld. Raym. 480.

Nor ought the words "one month" mentioned in the leases be construed a lunar month.

In truth it is absurd to suppose that, at this day, any person, in making a contract in which the term month occurs, means thereby a lunar month. It was anciently otherwise. But *cessante ratione legis, cessat ipsa lex.* And as we know that men, in their contracts now, always mean by the word month a calendar month, it would be unjust to hold that they mean twenty-eight days.

In Shapley v. Gary, 6 S. & R. 539, where by deed a party covenanted to pay a sum of money two months after date, it was said by the Court that the "tendency of the common law to adapt itself to the feelings and habits of men, is one of its most estimable qualities," and that "however wise this rule [as to counting by lunar months] may have been in its origin, the reason of it has long ceased." And the Court, in that case, wholly repudiated the doctrine of counting by lunar months.

It has been held that, in construing statutes, calendar months must always be intended. Hunt v. Holden, 2 Mass. R. 170; Churchill v. Merchant's Bank, 19 Pick. 532; Commonwealth v. Chambre, 4 Dall. 144.

So, in mercantile contracts, the word month is always held to mean a calendar month. Chitty on Bills, 373.

Why, in the cases of statutes and of mercantile contracts, should the word month not mean the same thing as it does in a lease?

We submit that the rule now is, that whether the term month shall be construed a lunar or calendar month, must depend on the intention of the parties, to be gathered from the writing, or from surrounding circumstances. Lang v. Garey, 1 M. & S. 111; Hardin v. Major, 4 Bibb's R. 104.

Now, there are two reasons, under the rule last above stated, for construing the term month in the leases in question to mean a calendar month.

1. No one can suppose that the parties intended a lunar month.

2. Other parts of the leases show that the word month, as used in them, plainly means a calendar month. Each of the leases stipulates that the lessees "shall not be deprived of the use of the water" for more than one *month* in the aggregate in any one *year*." And if the lessees "shall be wholly or partially deprived of the use of any portion of the water power hereby leased, so as to prevent the operation of any of the hydraulic works usually propelled by such power, such deduction shall be made from the rent, accruing on such portion of the water power as the said party is so prevented from using, as will bear the same proportion to the *yearly* rent thereof, as the time during which the said party has been deprived of its use, bears to eleven *months*." Printed transcript, pp. 18, 22.

The term month, thus twice occurring in the leases, undoubtedly means calendar months. So, calendar months, as January, July, May, August, occur in other parts of these leases. Shall we, (as indeed we must,) hold that the term month twice occurring, and the names of months four times occurring, in other parts of the

leases, mean calendar months, and yet hold that when it occurs as fixing the time when rent may be demanded, it means a lunar month? Does not the rule *Noscitur a sociis* eminently apply here?

3. The demands were made at the proper time of day.

The demands, on the first day of May, were made "a little before sundown."

The demands, on the first of June, "were made in the afternoon and before sundown."

Whatever may be said of the exact hour of demanding rent, here was certainly proper evidence to go to the jury, touching the proper time of day of the demand; and the court could not, under such evidence, tell the jury that no proper demand was made.

The lessee did not ask any hypothetical instruction, or any instruction touching the abstract rule of law, on this point. All the instruction prayed, touching the time of day of the demands, was his 25th, viz: "That the testimony adduced by the plaintiff, and in evidence, did not prove such a demand of the rents, on the first day of June, 1860, as would authorize them to consider the leases forfeited for the non-payment of rents." Printed transcript, p. 30.

We submit that to have given this instruction would have been error. Certainly there was some evidence of a proper demand at the proper time of day of the rents in question. Whether it was sufficient evidence is immaterial to the present discussion. For it has lately been settled by this Court that "Whether there be any evidence, is a question for the judge; whether there be sufficient evidence, is for the jury." Chandler v. Von Roder, 24 How. 225.

And even if the instruction asked was the law as applicable to the case, the refusal to give it cannot be assigned for error; because the court did give a proper instruction on the point, as follows:

"4. In order to insist upon a forfeiture under this pro-

vision, it was incumbent on the lessors of the plaintiff, by themselves, or their authorized agents, to have entered on the demised premises, on the last day for the payment of the rent, and there, in the most public place, and at a convenient hour of the day before sunset, in an audible voice, have demanded payment of the precise amount of the rent, due for the 6 months." Printed transcript, p. 31.

This, we submit, was all the instruction the lessee was entitled to on the question of the demand. It is full and clear, and, as to the time of day, it is in the very words of the books. Taylor's Landlord & Tenant, s. 493; Co. Lit. 202 a.

Now it is a rule that "the refusal to give an instruction is not error, if the same in substance has been given." Abrams v. Smith, 8 Blackf. 95.

There is still another objection to a reversal on this matter of the times of the demands of rent, and which equally applies to the whole subject of these demands. The lessee has, in his bill of exceptions, set down "all the testimony given on the subject of demanding rents." And, then, he asks the Court in the instructions to construe this evidence. The whole procedure is contrary to the practice of this Court, heretofore declared "in explicit terms." "To bring all the testimony offered at the trial of a cause at common law, instead of facts, into this Court by a bill of exceptions, or otherwise, is a practice, which, to say the least, is extremely inconvenient. Its tendency is to convert this Court from a tribunal for the decision of points of law into one for the investigation of facts, and for weighing evidence." "If the defendant's counsel wished the instruction of the Judge to the jury on any point, which was omitted in the charge, his course was to suggest the point, and request an opinion on it. If counsel may, without pursuing this course, spread the whole testimony on the record, and then, by a general exception to the charge, enable himself to take advan-

tage, not only of a misdirection, but of any omission to notice any question, which may be supposed by this Court to have arisen in the case, such a course would obviously transfer to the Supreme Court, the appropriate duties of the Circuit Court, and cannot be countenanced." Armstrong v. Toler, 11 Wheat. 258, 277.

It seems to us, too, that all the errors alleged, touching the instructions to the jury, violate No. 4 of the Revised Rules of 1858 of this Court, relating to bills of exceptions. The bill of exceptions to the charge given by the Court is a literal violation of that rule. And the bill of exceptions to the decision of the Court, refusing to give 25 instructions, asked by the lessee, violates, at least, the spirit of that rule, as we suppose. But, if, in this supposition, we are mistaken, still, unless every one of those instructions ought, under the circumstances, to have been given, there could be no error in refusing to give them. For, as the whole 25 instructions were asked *en masse*, unless they were all right, they may be rejected *en masse*.

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T. A. HENDRICKS,
Attorneys for Defendants in Error.

SUPREME COURT

OF THE

UNITED STATES.

WILLIAM SHEETS,

vs.

JOHN DOE, *ex dem*,
HENRY R. SELDEN,
HARMON WOODRUFF, AND
NICHOLAS E. PAINE.

IN ERROR FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF AND ARGUMENT FOR PLAINTIFF.

J. MORRISON,
ATTORNEY FOR PLAINTIFF IN ERROR.

STATE SENTINEL STEAM PRESS.—Indianapolis.

IN THE SUPREME COURT

OF THE

UNITED STATES.

WILLIAM SHEETS,
vs.
JOHN DOE, *ex dem*,
HENRY R. SELDEN,
HARMON WOODRUFF, AND
NICHOLAS E. PAINE.
} *In Error.*

This was a suit in ejectment, tried in the Circuit Court of the United States for the District of Indiana, at the November Term, 1861.

There was a verdict against the plaintiff in error, and judgment accordingly. Exceptions were taken to the rulings of the Court, during the progress of the trial, and to the instructions of the Court to the jury, and to the refusal of the Court to give the instructions asked for on the part of the plaintiff in error.

A writ of error was sued out during the term, and service of a citation to appear, has been acknowledged by one of the attorneys for the defendants, by an indorsement on the citation.

Transcript pp. 68, 72.

On the trial, the lessors of the plaintiff pretended to no other title to the premises, than as purchasers under persons deriving title through one Francis A. Conwell, to whom the Governor of the State of Indiana, and the Auditor of

State had executed an instrument, purporting to convey the State's interest, in fee, in pursuance of certain acts of the State Legislature, which will be more particularly noticed in this statement.

This plaintiff claimed and held possession, as the tenant of the State, under two several leases; one of them granted to the plaintiff and one Daniel Yandes, bearing date 12th February, 1839; the other to the plaintiff alone, dated 1st January, 1840, each of them being for the term of thirty years, and renewable; the rents falling due on the 1st day of May, and the 1st day of November in each year.

The leases are both set out in bills of exceptions, No. 3 and 4, *in extenso.*

Record, pp. 32 to 40, and 41 to 49.

They each demise the use of certain *water power*, at Indianapolis, to be applied to the manufacture of paper, at the rental of 150 dollars per annum *for each power*, payable half yearly, as before stated, declaring that "if at any time, any instalment that shall become due for rent, shall remain unpaid for *one month* from the time it shall become due, or if the party of the second part shall in any respect violate, or fail to comply with any of the stipulations contained in this agreement, then, and in either case, all the rights and privileges secured to said party by this agreement, shall cease and determine, and *any authorized agent of the State, or lessee under said State*, shall have power to enter upon the premises and resume all the rights and privileges hereby granted to the party of the second part; and said party of the second part shall moreover be liable to pay for all damages consequent upon a violation of this agreement."

Before going into trial, on the motion of this plaintiff, the Court ordered the claimants to state the particulars of their cause of action, which was done in four paragraphs, the *first* of which is;—

That by the terms of each of the leases under which the defendant claims possession of the premises in the declaration mentioned, it is provided that the rents therein reserved, shall be paid semi-annually, on the first days of May and November, in each year, during the continuance

of said leases respectively. That under the lease of the 1st of January, 1840, 110 dollars and 48 cents, for the six months between November 1st, 1859, and May 1st, 1860, became due on the day last aforesaid; and at the same time, and for the same period, 220 dollars and 96 cents became due under the lease of 12th February, 1839. And on the 1st day of May, 1860, at a convenient time of the day, just before sun down, on the most public place on the premises, the lessor of the plaintiff demanded the said sum of 110 dollars and 48 cents of rent; and at the same time and place, as a distinct act, and for the same premises, for the six months aforesaid, demanded as much rent as was then due therefor. And also, at a convenient time of the day, just before sun down, on the said 1st day of May, 1860, at the most public place on the premises mentioned in the lease of 12th of February, 1839, they demanded the said 220 dollars and 96 cents rent; and at the same time and place, and as a distinct act, they also demanded as much rent as was due for the premises last mentioned. And afterwards, to-wit., on the 1st day of June, 1860, they entered upon the said premises respectively, and in the most public place on each of them, repeated the demands; and none of the said rents being then paid, declared said leases forfeited respectively, and on account of the breaches of said covenants to pay rent, entered upon and took possession of said premises respectively: That by each of said leases it is provided, that if at any time any instalment should become due for rent, and should remain unpaid for one month from the time it should become due, or if the tenants should in any respect violate or fail to comply with any of the stipulations contained in said leases respectively, then, and in either case, all the rights and privileges secured to them respectively by said leases, should cease and determine, and that the State of Indiana, by which said leases were made, and under which the lessors of the plaintiff claim said premises, by deed of conveyance, should have power to enter upon and take possession of said premises, and resume all the rights and privileges granted to the lessees respectively:

That no part of such rents have ever been paid; and

that all said demands were made at a proper and convenient hour of the days named; that the premises were unoccupied; that neither said Sheets nor any agent was on the premises, which were shut up; and that both before and after said days, and before the commencement of this suit, the defendant often personally declared to the lessors of the plaintiff, that he would never pay any part of the rents so demanded, and as to said rents, wholly set said lessors at defiance.

The *second* assignment is,—

That on the 12th day of February, 1839, the State of Indiana owned in fee, the premises in the declaration mentioned, and continued such owner, until the 3d day of June, 1851; that by a lease to run 30 years, the State leased the premises first named, to the defendant and one Daniel Yandes; and on the first day of January, 1840, leased to the defendant, the premises secondly named, for 30 years; that the leases were of said premises, and certain water power and privileges therewith respectively connected.

After repeating the terms and conditions of the leases, as in the first paragraph, it is averred that large sums of money became due to the State, towit: on the lease first mentioned, the sum of 666 dollars fell due on the first days of November and May, every year, from the first day of August, 1846, till the 30th day of June, 1851; and on the lease last mentioned, the sum of 333 dollars and 33 cents fell due on the first days of May and November, every year, for the same period; that these moneys should have been paid into the State Treasury, though they have not been so paid, or any part thereof; that afterwards, on the 30th day of June, 1851, the State conveyed said premises to Francis A. Conwell, and the same, before the commencement of the suit, came to the lessors of the plaintiff, by intermediate conveyances, on the 2d day of October, 1857; that from the first day of August, 1846, till this time, no rents were paid, though large sums fell due on every first day of May and first day of November, and although often requested, the defendant has refused to pay; and during all that time has set the State at defiance, and

all persons holding under the State; and after the lessors of the plaintiff became the owners, to-wit, on the first day of June, 1859, he refused to pay them any such rent,—set them at defiance, refused to recognize them as his landlords, and denied their title to said premises; and that the defendant has therefore forfeited all right to hold possession.

The *third* paragraph is, that under the provisions of the leases, the lessee forfeited his right to hold, because he did not pay according to the terms of the leases.

The *fourth* paragraph is similar to the third, alleging that for failing to pay the rents, as stipulated, the term of said Sheets, and his right and estate in the said premises became void.

Before proceeding to trial, the defendant in the suit, by his counsel, moved the Court to reject the second, third, and fourth paragraphs of the said particulars, because neither of them stated facts sufficient to establish a forfeiture of the leases, or either of them; which motions were overruled, and an exception was taken to the decision.

Record, p. 26, Exception No. 1.

The lease to Yandes and Sheets, was executed on the part of the State, by the President of the Board of Internal Improvement, and by the lessees, in this form:

"D. H. MAXWELL, Pres't B'd Int. Imp., [Seal.]
"DANIEL YANDES, [Seal.]
"WM. SHEETS." [Seal.]

The lease to this plaintiff alone, was executed by Noah Noble, Acting Canal Commissioner, on the part of the State, and by the lessee, in this form:

"N. NOBLE, Act. Com'r
N. Div. Cent. Canal."
"WM. SHEETS."

Exceptions No. 3 and 4, Record pp. 40 and 49.

At this particular point, attention is respectfully requested to the fact, that the first named lease is sealed merely by appending an *ink scrawl* to the name of D. H. Maxwell, the President of the Board of Internal Improve-

ment, and the agent of the State; and that the second lease is without the sign of a seal, public or private. The leases were executed under the act of the 27th of January, 1836, entitled "an act to provide for a general system of Internal Improvements."

Acts of 1836 p. 6.

After wasting some millions in the effort to carry out her grand scheme of Internal Improvements, and after having constructed some eight miles of her Central Canal, from the feeder dam north of Indianapolis, to the city; and leased to this plaintiff and others, portions of the surplus water, not needed for purposes of navigation, the State broke down, and determined to sell out. And so, two acts of the Legislature were passed at the same session, in 1850, authorizing a sale; by the first of which, approved 19 January, 1850, entitled "An act to authorize the Governor of Indiana to compromise with, and to cause suit to be brought against the lessees of the water power of the Northern Division of the Canal," the *Governor* was authorized to sell "all the right, title, and interest of the State of Indiana, in and to the Northern Division of the Central Canal, and all the rents that shall become due after the sale of the said property, and the water power, and appurtenances thereunto belonging, to the highest bidder therefor."

Acts of 1850, p. 21, sec. 3.

By the second act, approved 19 January 1850, entitled "An act to authorize the sale of the Northern Division of the Central Canal," the *Governor* and *Auditor of State* were "authorized to make sale and dispose of all the right, title, interest, claim and demand which the State holds in the Northern Division of the Central Canal, situated in the said State of Indiana, with all the water power and appurtenances thereunto belonging," and authorizing those officers to convey the same to the purchaser, on behalf of the State, in the name of the State of Indiana.

Ib. p. 22.

In the Governor's annual message to the succeeding legislature, he reported that a sale had been made *by him* to certain parties; and "a Joint Resolution on the subject

of the sale of the Northern Division of the Central Canal" was thereupon adopted by that body,—approved February 7, 1857, confirming the sale, and directing *the Governor* "to convey the several portions of said canal, with the rights, privileges, and appurtenances thereunto belonging, *as sold by him*, to the purchasers, their heirs or assigns, as soon as said purchasers, severally, their heirs or assigns, shall pay the purchase money by them severally bid, and execute the bonds according to the conditions of the sale, to the acceptance of His Excellency the Governor."

Acts of 1850–'51, p. 200.

An act was also passed at the same session, approved February 13, 1851, entitled "An act to incorporate the Central Canal, Manufacturing, Hydraulic, and Water Works Company," the 9th section of which provided that *the Governor* should make the conveyance to *the said Company* or any member thereof, or to any other person or persons who might obtain an assignment from the purchasers, (who were George G. Shoup, James Rariden and John S. Newman,) in as full and ample a manner as the Governor could or should do, to said purchasers or assignees, on executing the required bond to the acceptance of the Governor.

Local laws of Indiana, 1850–'51, p. 358.

Afterwards, on the 30th day of June, 1851, the Governor and Auditor of State, (Joseph A. Wright and Erastus W. H. Ellis,) executed to Francis A. Conwell, an instrument, which the lessors of the plaintiff claim to be a deed of conveyance by the State, in accordance with the acts aforesaid.

It purports to be made "between *Joseph A. Wright*, Governor of the State of Indiana, and *Erastus W. H. Ellis*, Auditor of said State, of *the first part*, and *Francis A. Conwell*, of *the second part*," reciting the sale, and referring to the several acts under which the instrument professes to have been executed, which are those herein before cited; and acknowledging the payment of the purchase money, and the execution of the bond, and its approval by the

Governor, showing that Conwell was assignee of the purchasers.

It then proclaims, that by virtue of the power vested in them by the acts and joint resolution therein named, "We, Joseph A. Wright, Governor of the State of Indiana, and Erastus W. H. Ellis, Auditor of said State, do hereby convey to the said Francis A. Conwell," &c., concluding with the following attestation and signing:

"In testimony whereof we have hereunto set our hands and affixed the seal of said State, at the city [SEAL.] of Indianapolis, the day and year first above written."

"JOSEPH A. WRIGHT, Governor,
"ERASTUS W. H. ELLIS,
Auditor of State."

"CHARLES H. TEST, Secretary of State."

Our assignment of errors discloses the several points upon which we rely for a reversal of judgment of the Circuit Court.

The exceptions taken to the refusal of the Court to instruct the jury as requested by us, and those taken to the instructions given, point to the following propositions, all of which were discarded by the Court below, but which we nevertheless respectfully submit to be sound law.

1. That admitting the validity of the instrument executed by Governor Wright and Auditor Ellis, to Francis A. Conwell, purporting to convey to the latter, all the interest of the State of Indiana in the premises described in the acts of the Legislature of the State authorizing the sale,—neither Conwell, nor those claiming title under him, could maintain ejectment against this plaintiff for failing to pay the stipulated rents, he being in possession as tenant to the State under the leases given in evidence.

2. As the leases contain no stipulation for the payment of rents for the *lands* demised, the rents reserved being for the use of the *water*, merely, otherwise described as the *water power*, ejectment will not lie; "water," or "water

power," being intangible, and not therefore capable of delivery under the writ of *habere facias possessionem.*

3. The instrument purporting to convey the State's interest in the canal, water power, &c., executed by the Governor and Auditor to Conwell, is not such an instrument as was contemplated and required by the provisions of the acts of the legislature. It was not a conveyance "in the name of the State." Hence the *legal title* remains in the State, and if so, these defendants cannot maintain ejectment.

4. There was no such formal demand made of rent as entitled the claimants to enter as for condition broken; the first demand being premature, and the last one too late.

5. The demand was not made by the landlord, nor by any person duly authorized for that purpose.

I propose to discuss these several propositions in their order:

I. Sheets, my client, being in possession under the leases, cannot be ejected at the suit of these claimants, for a failure to pay to them the rents demanded, even if the claimants were, by virtue of their purchase, the assignees of the reversion.

"Provisoes for re-entry are construed strictly with respect to the parties who may take advantage of them, and only include the parties who are expressly named: Thus, a power for C. to enter will not extend to his executors."

Tillinghast's Adams on Eject. 191, citing Wiles, 500.

"At common law the benefit of a condition can be reserved only to the grantor, or lessor, or his heirs; therefore, no person could enter for breach of an express condition, except parties and privies in right and representation; that is, heirs, executors, &c., of individuals, or the successors of corporations. Neither privies nor assignees, in law, as the

Their first reference was to the Revised Statutes of 1843, p. 443, sections 151 and 152, which are as follows:

"SEC. 151. The lessees of any lands, their assigns, or personal representatives, shall have the same remedy, by action or otherwise, against the lessor, his alienees, grantees, assignees, or his or their representatives, for the breach of any covenant or agreement in such lease contained, as such lessee might have had against his immediate lessor.

"SEC. 152. The alienees or grantees of any demised lands, tenements, rents or other hereditaments, or of the reversion thereof, and the assignee of the lessor of any demise, and the heirs and personal representatives of such alienee, grantee, or assignee, shall have the same remedies, by action or otherwise, for the non-performance of any agreement contained in the lease so assigned, or for the recovery of any rent, or for the doing of any waste, or other cause of forfeiture, as their alienor, grantor, or lessor, had or might have had, if such estate, interest or reversion, had remained in such alienator, grantor, or lessor."

The reasonable presumption, from this enactment and other provisions of the same chapter and article, is, that the Legislature, aided by their able committees of revision, intended to confer upon grantees or assignees of reversions, the same privileges and powers that the act of 32d, Henry 8, C. 34, had conferred upon them, as interpreted by the English Courts, and nothing more; and I think that intention has been effected.

The 24th section of the same chapter, (article II,) entitled "Of alienation by deed, and recording conveyances, mortgages, and other instruments of writing," reads thus: "No conveyance of any estate in fee simple, or for life, or of any future estate, *and no lease for more than three years from the making thereof*, shall be valid and effectual against any person other than the grantor, his heirs and devisees, and persons having notice thereof, unless it be made by *a deed* recorded within the time and in the manner provided in this article."

R. S. 1843, p. 418.

The succeeding section requires all such instruments to

be recorded within ninety days; and the 54th section, p. 423, declares that all deeds, conveyances, &c., *except leases for a term not exceeding three years*, and executory contracts for the sale and purchase of land, *shall be deemed a conveyance*, within the provisions of this article," &c.

It is also provided by the 25 section, chapter 33, of the same statutes, (1843,) p. 592, that "all deeds, *conveyances*, bonds, and powers of attorney for the conveyance of real estate, or *of any interest therein, shall be executed with a seal*, either of wax or wafer, or of ink, otherwise called a scrawl; and all other instruments of writing to which by law or the agreement of the parties, a seal is necessary, may be sealed by any of these methods, and each shall have the same effect in law, *except where any statute of this State shall require a specific seal to any instrument of writing*."

The preceding section declares that "The term 'conveyance,' used in that chapter, shall be construed to embrace every instrument in writing, (except a last will and testament,) whatever may be its form, and by whatever name it may be known in law, by which any estate, or interest in lands, is created, aliened, assigned or surrendered;" and the 23d section declares, that "The terms 'estate,' and 'interest' in lands, shall be construed to embrace every estate and interest, freehold and chattle, legal and equitable, present and future, vested and contingent, in lands, tenements and hereditaments."

I am thus particular to quote the language of our statutes, because, as I remember, one of the able gentlemen on the other side was quite emphatic in his denial that a leasehold term of years in lands, was "an interest in lands," within the meaning of the statutes.

If my memory and notes serve me truly, it was also claimed, that the acts of 1843 on the subject, were repealed by the revision of 1852. It may be so.

1, R. S., 1852, p. 430.

The sale of the canal was, however, made prior to such repeal; and therefore, whatever legal rights were acquired by either party under the laws of 1843, or under any other laws, remained to them, notwithstanding such repeal; but

no more. "All vested rights" were unaffected by the repeal.

But the revision of 1852, continues the same provisions, substantially, if we understand their import.

"Alienees of lessors and lessees, shall have the same legal remedies, in relation to such lands, as their principals."

2d R. S., 1852, p. 243, sec. 10.

This act was approved May 20th, 1852.

Previous to that act, (on the 6th day of the same month and year,) "an act concerning real property and the alienation thereof," had been passed; the 4th section of which provides, that *conveyances of lands*, or of any interest therein, shall be by *deed in writing*, subscribed, *sealed*, and *duly acknowled by the grantor*, or by his attorney, except *bona fide* leases for a term not exceeding three years."

1st R. S., 1852, p. 233.

The 11th section of that act, is a copy from the 24th section of the act of 1843, p. 418.

The 16th section, is similar to the 25th section of the act of 1843, requiring leases for more than three years to be recorded.

The 33d section declares that the term "grantor," as used in the act, shall be construed to embrace every person by whom any estate or interest in lands is created, granted, bargained, sold, conveyed, transferred or assigned.

Ib., p. 238.

It will be noticed that the 34th section declares a lease for a term exceeding three years, to be a *conveyance* within the provisions of the act.

We therefore respectfully submit, that the latest revision, which is that of 1852, quite as plainly as the former did, requires a lease for a term exceeding three years, to be *sealed* and recorded; and that when it is provided that "alienees of lessors and lessees of land, shall have the same legal remedies, in relation to such lands, as their principals," the provision is properly applicable to such lessees, and to such only, as hold by lawful tenure, evidenced by the required form of demise,—which, when the

term exceeds three years, must be by lease in writing,—*sealed and recorded.*

To interpret the provision in such a manner as to embrace *all leases*, verbal and written, sealed and unsealed, would be plainly repugnant to the scope of those other provisions which have been referred to.

Statutes in *pari materia* must be construed with reference to each other.

In their argument, counsel referred to the 272d section of the State Court practice act,

2d R. S., 1852, p. 90.

That section declares,—"There shall be no difference in evidence, between sealed and unsealed instruments; and every writing not sealed, shall have the same force and effect that it would have if sealed," &c. But the 276th section of the same act declares, that that provision "does not repeal or affect any statute of this State, *expressly requiring a seal* to a deed or other instrument."

The law at this moment requires a lease for a term exceeding three years, to be *sealed* and *recorded;* and so it did at the time of the sale of the canal, and at the time the so called deed of conveyance was made to Conwell. We find no such requirement in our statutes prior to 1843; nor do we find in them anything before that time, conferring on the assignee of the reversion, the privileges and rights conferred by the act of 1843, and continued by the act of 1852.

If therefore the claimants rely upon those acts, or either of them, they must take them as a whole, and with their own well defined qualifications and exceptions.

But it was insisted, that the lease to defendant and Yandes, is duly sealed. If this be so, then the objection fails as to that.

Our abstract shows *how* it is sealed, and the character of the seal.

As between private persons, it might be regarded as sealed, by both parties; but the lessor being the State, the private ink scrawl of the State's agent is not sufficient.

So plain a distinction would seem to require no citation of authorities.

The common law required that every conveyance of land, should not only be in writing, but *sealed* and delivered; and in this country the same provision prevails, with some modifications.

Taylor on Landlord and Tenant, p. 18, sec. 34; 8 East., 165.

But it was also claimed, that the leases were assigned, and all the remedies with them, which the State could have enforced, by the inherent force alone, of the statutes authorizing the sale and conveyance, without regard to the general law, as administered between private persons.

If such should be the effect, then, then the strict rules of law on the subject of forfeitures of estates, would be a dead letter.

We do not admit that those statutes possess any such potent virtues,—certainly the language of the acts do not justify such an interpretation. They prescribe, plainly enough perhaps, what should be sold and conveyed, but they do not pretend to define the effect. That must be determined by the application of the ordinary rules of law.

II. The leases contain no stipulation on the part of the defendant for the payment of rent for the *land demised;* the rents reserved being for the use of the *water* only, or the *water power.*

The language of the leases, in this regard, is plain and explicit.

There are two grants or demises; the first being simply and solely, of "the use and occupation of so much of *the surplus water*," &c., as would be sufficient for a specified object.

And the *reddendum* is in strict accordance with that particular grant, and applies to it exclusively. Here it is:

"And the said party of the second part, for and in consideration of the right to the *use and occupation of said water*, agrees to pay to the State a yearly rent at the rate

of $150, for *each power used.*" The *power*, according to the lease, meaning a portion or quantity of water sufficient to propel a run of 4½ feet mill stones, &c., &c.

Although the concluding paragraph of each of the leases, demises to the lessees, a particular piece of ground, on which the water power was to be used, yet as to that, there is no *reddendum;* no stipulation for rent, expressed or implied. The following is the clause:

"And the said party of the first part, *in consideration of the rents and agreements herein before specified*, further agrees, to lease to the party of the second part, upon the same conditions, and subject to the same limitations and restrictions herein contained, for the use of the water power hereby leased, for the like term of 30 years, from the first day of January, 1839, the particular portion of ground belonging to the State, at said point, included within the following boundaries," &c.

The State leased the land where the water power was to be used,—the consideration, as expressed, being that the lessees had stipulated to pay rents to the State *for the water power*, and had entered into other agreements in relation thereto, for the use of the power thereby leased.

The consideration was sufficient, but it was not, certainly, a stipulation to pay a money rent, or any other rent, for *the land.* Neither is it a condition which would pass a right of action to the assignee of the reversion, even if the demise were under seal. And if it were, and could be regarded as a covenant running with the land, still, ejectment would not lie for *the land*, because the lessee had failed to pay the rent for *the water.*

An entry for condition broken, must be *upon the land for which the rent claimed is in arrear*; and not upon land upon which rent is not chargeable; and so, ejectment can be sustained only for the land upon which the rent is chargeable.

Ejectment will not lie *for water* or a *water power*, it being regarded as intangible, and incorporeal, and therefore the marshal could not give possession under the writ of possession.

III. The lessors of the plaintiff are not grantees or assignees of the reversion, the State never having parted from the *legal title* to the premises described in the leases.

The instrument executed by Governor Wright and Mr. Auditor Ellis, to Conwell, was not a conveyance in pursuance of the several acts of the legislature, authorizing the sale of the Northern Division of the Central Canal.

As has been shown, these acts require that on full payment being made of the purchase money, and the execution of a bond to the approval of the Governor, a deed of conveyance should be executed and delivered *in the name of the State, and under the seal of the State.*

The first act, which was that of 18th January, 1850, required the conveyance to be *executed by the Governor.*

By the act of 21st January, 1850, the sale was to be made by the *Governor and Auditor*, and the conveyance was to be executed by those officers, "on *behalf of the State*, in *the name of the State.*"

The joint resolution of 7th February, 1851, directed *the Governor* to convey; and the 9th section of the act of 13th February, 1851, incorporating the Central Canal Manufacturing &c., Company, directed the *Governor to make the conveyance* to the assignees of the purchasers, in *as full and ample* a *manner* as *he could or should do* to *the purchaser, &c.*

These two were the last in the series of the enactments on the subject, and must of course govern, wherever they conflict with any former acts; and first and last, the Governor alone, was the agent of the State for that specific object.

There is, however, another objection to the instrument. It is not a conveyance *by* the State, nor is it *in the name* of *the State.*

It runs thus:

"This Indenture, made this 30th day of June, in the year of our Lord one thousand eight hundred and fifty-one, between Joseph A. Wright, Governor of the State of Indiana, and Erastus W. H. Ellis, Auditor of said State, of the first part, and Francis A. Conwell, of the second part."

The instrument refers to the several statutes under which those functionaries claimed to act, by their titles, except the last one, which is omitted, declaring that by virtue of the power vested in them by the acts and joint resolution therein named, "We, Joseph A. Wright, Governor of the State of Indiana, and Erastus W. H. Ellis, Auditor of said State, do hereby convey to the said Francis A. Conwell," &c.

Beyond dispute, the *conveyance* contemplated by the several statutes, was *a deed* of *bargain and sale;* and in such a deed, and in every grant, there must be a grantor, a grantee, and a thing granted; as in every lease, there must be a lessor, a lessee, and a thing demised.

To maintain ejectment, the claimant must be vested with the *legal title.* An equitable title will not avail him in this action. This is a legal truism; and it is sufficient for the defendant, if he can show the title of the land to be out of the lessors of the plaintiff.

By their purchase, and their compliance with the terms and conditions of sale, the purchasers, or their assigns, were entitled to a deed of conveyance, in the name of the State, to be executed by the Governor, and under the seal of the State.

Until such a conveyance is executed and delivered, only an equitable title passed.

It is conceded, that in many cases of government contracts, the intention to bind the government, and not the agent will prevail, where from the whole instrument, such intention is manifest; but this exception will not apply, where the act of the agent, and the manner of its execution, are alike specifically pointed out by legislative direction; and especially does it not apply to a case like the present, where the effect of the act of the agent is to divest the State of title to a valuable freehold estate in lands, and important public franchises, besides.

The legislature has provided *how* that thing should be done, and *by whom.* The perfected contract of sale, must be evidenced by *a deed of conveyance* to the purchasers or their assigns, *to be executed by the Governor, on behalf of the State, and in the name of the State.* Until such a con-

veyance shall have been executed and delivered, the legal title remains in the State.

It was however claimed, and the Court sustained that view, that the preamble of the act of the State legislature of the 9th March, 1859, entitled "an act for the relief of the lessees from the State, of the water power and other privileges of the Northern Division of the Central Canal," &c., operated by way of *estoppel* against the State, vitalizing the pretended conveyance to Conwell.

Acts of 1859, p. 167.

The preamble is lengthy, purporting to recite the whole chain of legislation, from the passage of the acts authorizing the sale of the Canal, down to the time of the passage of the act of 1859; and amongst other things, that "the right, title, and interest of the State, in and to that portion of the Northern Division of the Central Canal, north of Morgan county, was sold and conveyed to Francis A. Conwell," &c., by *a deed of conveyance from said State, bearing date the 30th day of June*, 1851.

The date of the supposed conveyance, in this recital, corresponds with the date of the instrument given in evidence on the trial, executed by the Governor and Auditor, and under which the lessors of the plaintiff claimed to derive their title.

The question is, therefore, did the recital make that instrument a deed of conveyance?

The doctrine, as to the force and effect of the recitations in the preamble of a private statute, is elaborately and ably discussed by Judge Perkins, in the case of *The State* v. *Beard and others*, in 1 Ind. Rep., 460, where the leading authorities are reviewed.

The sum of the doctrine seems to be, that the recitations in such an act, may be admitted in evidence, *prima facia*, as between *the person for whose relief the Statute was passed*, and the State; but that they cannot operate by way of *estoppel*.

The act was not offered to the jury nor to the Court, as evidence merely, but was relied upon as *conclusive* of the fact, that the State had conveyed; and I suppose, will be pressed into like service in this Court.

If the State were setting up a claim, there would be much stronger reason for admitting the effect of the preamble to be as was claimed by the other side; but the argument of the Court, in the case of the *State* v. *Beard*, above cited, against the conclusiveness of such a recital, would seem in the present case, to be unanswerable.

We also respectfully submit, that if assignees, in any sense, the purchasers are at best, assignees of a *part* only of the premises covered by the leases.

"An assignee of the reversion, in part of the lands demised, is not an assignee within the Statute," 32 Hen. 8th. c. 34; for the condition being entire, cannot be apportioned by the act of the parties, but shall be destroyed."

Adams on Ejectment, 76, referring to *Vivyan* v. *Arthur*, 1 B. & C. 410.

The State was the owner in fee of all the lands demised by the leases, but the State did not sell, nor authorize a sale of all of those lands.

The two acts of 19th January, and 21st of January, 1850, specifically designate and describe what should be sold and conveyed.

By the first named act, the sale was to be of "all the right, title and interest of the State of Indiana, in and to the Northern Division of the Central Canal, and all the rents which shall become due after the sale of the said property, and the water power and appurtenances thereunto belonging."

Upon payment of the purchase money, &c., the Governor was to convey by deed, in the name of the State, &c., "the bed of the Northern Division of the Central Canal, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water-power, structures, *and all the appurtenances thereunto belonging*."

Sec. 3.

Now, the pieces of land demised are *none of these* things, if they are not comprehended and embraced by the terms, "appurtenances thereunto belonging."

"Lands will not pass by the word appurtenances, *by deed.*"

1 Tom. Law Dic. 92, and the references.

1 Burrills' Law Dic. 84, and the references. 10 Peters' R. 25, *Harris et al* v. *Elliott.*

To insist that the particular tracts described in the leases, are *appurtenant* to some one or more of the things sold by the State, would be to maintain that *land* can be *appurtenant to land;* or what would be more absurd, that land can be appurtenant to a mere casement—a right of way, a water power, or a stream of water, natural or artificial. The lands demised cannot be "*appurtenant*" to the *bed of the canal;* nor to its *banks;* nor its *margins;* nor its *tow-paths;* nor its *side-cuts;* nor its *feeders;* nor its *basins;* nor the *right of way;* nor the *dams;* nor the *water power*; nor the *structures*, specified in the act.

"*Argumentum a divisione est fortissimum in jure.*" Co. Litt. 213, b.

IV. There was no such formal demand of the rent as entitled the claimants to enter as for condition broken; the first demand was premature; the second too late.

In *Connor* v. *Bradley et ux.*, 1 Howard's (U. S.) Rep. p. 217, the common law requirements, in regard to the right of re-entry on the ground of forfeiture for non-payment of rent, are distinctly and fully recognised.

One of these requirements is, that where, as in the present case, the agreement is, that "if the rent shall be behind and unpaid, by the space of thirty or any other number of days, after the days of payment, it shall be lawful for the lessor to re-enter—a demand must be made on the 30th *or other last day.*"

1 Sand. R. 286, *Duppa* v. *Mayo,* (note 16.)

Adams on Ejectment, 161.

According to the leases, the rents fall due on the first day of May and the first day of November in each year; but we have seen that the right to re-enter for a breach of

this condition, is suspended for *one month* from the time they became due.

The demand on the first day of May was, therefore, entirely useless; and that on the first day of June was equally ineffectual, if I have not mistaken the legal signification of the expression "one month" as used in the leases.

"Where the the word *month* occurs in any statute, it must be taken to mean a lunar month, unless calender months are specified."

2 Tomlin's Law Dic. 373.

"The month, by the common law, is but 28 days, and in case of a condition for rent, the month shall be computed at 28 days; so in the case of enrollment of deeds, and generally in all cases where a statute speaks of months."

Ib., referring to 1 Inst. 135; 6 Rep. 62; Cro. Jac. 167; 6 T. R. 224.

2 Burrill's Law Dic., title, "month," p. 727, and the numerous cases cited in accordance with the foregoing.

4 Kent's Com. 98, especially the comprehensive note at bottom.

It is conceded by the learned commentator in the note, that a month, *ex vi termini*, in the English law, means a lunar month. 2 Black. Com. 141. Although in mercantile contracts the usage, or rule, is to calculate the months as calendar, and in other contracts where such was the obvious intention, or in the instance given in Tomlin, from 1 M. & S. 111.

The Statutes of this State do not touch the question.

By the first section of the "act in relation to the construction of statutes and the definition of terms," (2 R. S., 1852, p. 339,) it is declared, that the word "month" shall mean a calendar month, unless otherwise expressed; but it will be observed, that the rule is limited expressly to "the construction of all the statutes of this State;" and there is another implied restriction, which is, that it cannot apply to *former* statutes or contracts.

Let it however be conceded, that I am wrong in this hypothesis,—the lessors of the plaintiff have yet another

obstacle to overcome before they can claim to have made their demand on the proper day.

Admit that a calendar month was meant, and that the Court will so construe the leases; then, the authority is, that the demand must be *on the last day of the month.*

Duppa v. *Mayo, supra.*

1st. Sand. R., 287, and note 16.

Whatever may be the rules in the different States, under statutory provisions, or otherwise, in regard to the mode of computing time, *from an act done;* and whether according to those rules, the day when such act is done, is to be included, or excluded, are questions outside of the case before the court; and it is proper to remark, that the statutes of Indiana do not reflect any light upon that subject.

The Revised Statutes of 1852, (p. 205, sec. 787,) declare that "the time within which an act is to be done, *as herein provided,* shall be computed by excluding the first day, and including the last."

This enactment embraces only the subjects to which it is applicable, under the "act to revise, simplify and abridge the rules, practice, pleadings and forms in civil cases, in the courts of this State," &c.

1 R. S. 1852, chap. 1, from p. 27 to 224, inclusive.

But there is nothing within the whole range of that act which touches the question in hand; and if there was, it would be inoperative in determining the rights of either of the parties, in this proceeding; for it is expressly declared, in the same act, that "no part of this act shall be retroactive, unless expressly so declared."

Ib., p. 224, sec. 801.

And if there was no such guard, the courts would excuse themselves from the task of changing the contracts of the parties, or interfering, in any way, with the rights and obligations existing between them, when their relation of landlord and tenant was inaugurated,—if it ever was legally inaugurated.

The common law rule must therefore govern; and whether the "month is lunar or calendar," the demand was on the wrong day.

"A demand made after or before the last day which the lessee had to pay the rent, in order to prevent a forfeiture, or off the land, will not be sufficient to defeat the estate."

1st Sand. R. 287, note 16, referring to 7th Term R. 117.

It was however insisted that a demand was unnecessary, because, as was said, the lessee had previously *disclaimed* holding under the lessors of the plaintiff.

There are two answers to this:

In the first place, it is not true.

Judge Selden stated on his oath, that he called on defendant at his business house at Indianapolis, not a long time after he had become interested in the speculation, about November or December, 1850, and spoke of the case, expressing a desire to come to some amicable arrangement for the future. A colloqium ensued, the defendant naming some of the disagreeables of his position, by the neglect of the State and her successors, in furnishing water for his machinery; and in the course of his remarks, he expressed some doubts in regard to the right of the lessors to call upon him for rents; and he especially dwelt upon what he regarded to be the obligation of the purchasers of the canal, to indemnify the lessees for what they had suffered.

Record, p. 53.

But whatever was the character of those remarks, they cannot, in fairness, be raised to the dignity of a disclaimer.

The defendant had been guilty of no act of disloyalty to his liege lords, if they were such. He had not attorned to a stranger, nor did he pretend to claim under an adverse title. He did not deny his tenancy under the State, his original landlord.

That Judge Selden did not understand the defendant to disclaim, in any formal or legal sense, we refer to his demand of rent, long afterwards.

As a lawyer, he would not have been guilty of such palpable inconsistency. He knew, as a learned counsellor and jurist, that a disclaimer, *in the proper sense*, operated as an instantaneous forfeiture of the lease, if he chose to take that advantage of it. He knew, as a sequence, that no demand was needed, after that; and he cannot complain

that now, his formal demand of six months' rent—from November, 1859, till May, 1860, should be regarded as a *waiver* of the supposed forfeiture, on account of the disclaimer.

In *Jackson* v. *Collins*, 11 Johns. R. 1, Ch. Justice Kent held, that the facts in that case were such as to render a demand of rent unnecessary. The defendant, in that case, not only denied holding under any lease from the Van Rensselær family, but claimed title under a warranty deed from a stranger; which latter fact was proved; and such conduct was held to dispense with all proof of any demand.

The learned Chief Justice observed that "the disclaimer by *parol*, might not have been sufficient, *of itself*, to amount to a forfeiture of the lease, but that it was sufficient to excuse the plaintiff from the necessity of a regular, formal demand of the rent, in like manner as the act or declaration of the opposite party, will in many cases, supersede the necessity of a formal tender."

That case is not like this one.

In that case there was no attempt at "a regular, formal demand of the rent," as there was in this. There was no demand of rents that accrued after the disclaimer. The defendant flatly refused to pay, standing upon his warranty title from another party. The plaintiff thereupon, without any parleying, brought his ejectment and recovered. He did not demand another instalment of rent, long after the supposed forfeiture had occurred. He did not treat the lessee as a continuing tenant, after he had openly and flagrantly repudiated his relationship as tenant, and boasted his fealty to another.

Judge Selden treated the defendant as his tenant, long after he had committed the offense for which he desires now to treat him as "a heathen man and a publican."

The law of waiver of forfeiture, is propounded with great clearness and force, by Mr. Justice Woodworth, in *Jackson* v. *Sheldon*, 5 Cowan, 448, where he says: "When a forfeiture has accrued upon a clause of re-entry for rent in arrear, the forfeiture will be waived, if the *landlord do any act after the forfeiture*, which amounts to an acknowl-

edgment of a subsisting tenancy; as if he receives rent due at a subsequent quarter." * * * * "By the terms of the lease, it was voidable, *at the election of the plaintiff*." pp. 454, 455 of the opinion.

And the opinion emphatically repudiates any doctrine to the contrary, elaborately reviewing the few cases that seem to favor the position that a forfeiture is not waived by taking an insufficient distress for the same rent.

Ib. p. 455, &c.

In *Woodward* v. *Brown and wife*, 13 Peters, p. 1, it was proved that the defendant not only refused to pay rent according to his covenant, but that he had attorned to a stranger, and claimed to hold adversely to his landlord's title. So, in *Willison* v. *Watkins*, 3 Peters, p. 44, the defendant not only disclaimed the tenure, but set up a title adverse to that under which he entered.

It was ruled in both cases, that although the defendants could not change the character of the tenures, by their own acts merely, yet at the option of the landlord, he might at once terminate the tenancy for such acts, and treat the tenant as a trespasser, or waive the forfeiture.

Judge Selden did waive the forfeiture, if it was such, when he afterwards, in his capacity of landlord, caused formal demand of an instalment of rent falling due long after the supposed forfeiture.

Nor can it be urged that the demand was made under misapprehension, or in ignorance of any fact that might have induced a contrary course of conduct on his part. The facts were all within his own personal knowledge. He has sworn to them himself, as a witness, and he cannot, as a ripe lawyer, claim that he was ignorant of the legal effect of a disclaimer by his own tenant.

But, will a simple questioning, or even a denial of the landlord's right to demand the rent, constitute a disclaimer, without attempting to do any act incompatible with the tenant's duties to the landlord under whom he went into possession? Ch. J. Kent, in *Jackson* v. *Collins*, *supra*, *doubts* whether the disclaimer *by parol* would be sufficient to amount of itself to a forfeiture of the lease, though he

says it was sufficient to dispense with a formal demand.

" And in American law, a tenant *disclaiming* his landlord's title, *and claiming the fee in himself*, is considered a trespasser, and may be ejected."

1 Burrill's Law Dic., p. 380, referring to 13 Peters R. 1; and 14 *Id.*, p. 156.

The cases cited show that the tenants had not merely *denied* their landlord's title, but that they had attorned, and claimed to hold adversely.

In *Woodward* v. *Brown*, *supra*, it was held that the objection to the sufficiency of the notice to the defendant, could not be sustained, because he had disclaimed his landlord's title, *and attorned to the Bank.*

And so also, in *Walton* v. *Bodley*, 14 Peters, p. 156, it was said,—" If a tenant disclaims his tenure, *and claims the fee in his own right*, of which the landlord has notice, the relation of landlord and tenant is put an end to, and the tenant becomes a trespasser."

Of course the learned judge did not mean, that that would be the inevitable result in every case; but the question of waiver was not involved in that case.

We however respectfully submit, that the verdict of the jury disposes of that question. The verdict is as follows:

" We, the jury, find the defendant guilty for and by reason of the forfeiture of the demises mentioned in the Bill of Particulars, for the non-payment of rents reserved in and by said demises respectively."

After what transpired on the trial in regard to the question of *disclaimer*, we feel that we are justified in claiming that that question should not trouble this honorable Court. For it was admitted in the argument before the jury, that the testimony on that point was too feeble to warrant a verdict for that cause; and the Court took the same view. And therefore it was agreed that the jury should so frame their verdict, as to preclude even an inference that the find-

ing was for any other cause than "the non-payment of rents reserved in and by said demises, respectively."

Whether or not the point will be pressed here, we cannot anticipate; but if it be, we rely on the special finding of the jury, as conclusive of the question.

V. The demand of the rent was made neither by the lessors of the plaintiff, nor by any person duly authorized for that purpose.

The law firm of McDonald & Walker were verbally requested by the claimants, to proceed to take the steps necessary to enforce a forfeiture, if the rents were not paid punctually on the succeeding first of May. But there was no written authority given, or pretended. The testimony of both Judge McDonald and Judge Selden, is explicit on that point.

This was not sufficient.

"The demand must be made by the landlord in person, or by an agent properly authorized."

Adams on Eject., p. 161.

Roe v. *West*, 7 East., p. 363.

Before the jury retired to consult of their verdict, the counsel for this plaintiff moved the Court to instruct the jury as follows, to-wit:

1st. That the defendant, being in possession of the premises, at the commencement of this suit, under the leases from the State of Indiana, which have been produced in evidence by the lessors of the plaintiff; and they claiming title under purchasers who bought from the State, by virtue of acts of the legislature of the State, approved 19th January, 1850, and 21st January, 1850—they, the lessors of the plaintiff, cannot recover, if the demises by the State were not by deed.

2d. That the lease to Daniel Yandes and William

Sheets, (the defendant,) not being sealed by the State seal, nor any other seal, except by an ink scrawl appended to the signature of D. H. Maxwell, (President of the Board of Internal Improvement) thus: "D. H. Maxwell, Prest. Bd. Int. Imp., [seal.]"—it was not a sealing by the State.

3d. That the leases contain no stipulation for the payment of rent for the land demised, the rents reserved being for the use of the water merely, or "the water power"—therefore—

4th. The lessors of the plaintiff are not grantees or assignees of the reversion, of the premises described in the leases; the State never having yet parted from the legal title.

5th. The instrument in writing, purporting to be a deed of conveyance, or "Indenture made this thirtieth day of June, in the year of our Lord, one thousand eight hundred and fifty-one, between Joseph A. Wright, Governor of the State of Indiana, and Erastus W. H. Ellis, Auditor of said State, of the first part, and Francis A. Conwell, of the second part,"—is not a conveyance by the Governor, in the name of the State of Indiana, of the premises described in the leases, in pursuance of powers conferred by the laws of Indiana, so as to vest the grantee and his heirs and assigns, with a right to enforce the conditions of the leases, or to enter for non-payment of rent, or any other breach of the conditions, as against the defendant.

6th. The demand of the rent falling due on the 1st day of May, 1859, made on the first day of June, 1860, was too late. To constitute a valid demand to enforce a forfeiture of the leases, it should have been made on the 31st day of May, 1860, at the very latest.

7th. The demand of rent, on the premises, by Walker, on the 1st day of June, 1860, was not a valid demand to establish a forfeiture of the leases; because it was made,

neither by the lessors of the plaintiffs, in person, nor by any agent properly authorized, nor in the proper form.

8th. A demand on the premises, of the rent, on the day it became due, made to establish a forfeiture of the leases, must have been made, by the lessors of the plaintiff, in person, or by an agent properly authorized.

9th. A member of the law firm of Messrs. McDonald & Walker, of Indianapolis, although such firm were the attorneys and counsellors of the lessors of the plaintiff in this suit, as well as their other law business; and although said firm were *verbally authorized* and instructed by the said lessors, to make such demand for the half year's rent, falling due 1st of May, 1860, for the express purpose of establishing a forfeiture of the leases, if the rents should not be paid,—was not an agent properly authorized to make a demand for such purpose, unless it is also proved, that the defendant was fully informed of such authority, before, or at the time of the demand; or, that the fact of such verbal authority was audibly announced, by the person professing to act as such agent, in making such demand on the premises.

10th. The fact that the defendant was not on the premises, nor on either of them, on the 1st day of June, 1860, when the demands were made by Walker; nor present to hear them, did not dispense with any part of the form of demand, nor the substance of it, which would have been material had the defendant been present to hear it.

11th. That as neither of the leases in evidence contain any stipulation on the part of the lessees, for the payment of rent, *for the lands* demised; and the rents reserved, being for the use of the *water*, or the *water power*, ejectment will not lie for the lands, for a failure to pay the rents.

12th. The lessors of the plaintiff are not the grantees

or assignees of the reversion, in the premises described in the leases respectively, in virtue of the titles derived from or under those who became the purchasers by virtue of the acts of the legislature of the State of Indiana, unless the instrument executed by Joseph A. Wright, Governor, and Erastus W. H. Ellis, Auditor of State, as parties of the first part, to Francis A. Conwell, bearing date 30th June, 1851, is such a conveyance of the State's interest in the demised premises, as was authorized and required by the provisions of the acts of the legislature on that subject.

13th. That said instrument, a copy of which was received in evidence, is not such a conveyance; and therefore the State has yet the legal title.

14th. That said instrument is not a conveyance, "on the part of the State, in the name of the State."

15th. That said instrument is not a conveyance of all the right, title, interest, claim and demand, which the State then had and held in the premises which the instrument assumes and purports to convey to Francis A. Conwell, his heirs and assigns.

16th. That said instrument is inoperative as a deed of conveyance, it not being executed *by the Governor, in behalf of the State, in the name of the State.*

17th. That purchasers through or under Conwell, did not acquire a legal title to the premises; hence the lessees of the plaintiff cannot maintain this suit, as such purchasers.

18th. That if, as such purchasers, the lessors of the plaintiff thereby became the assignees of the reversion, *in part* only of the lands demised, they cannot maintain this suit.

19th. The *lands* demised did not pass by the supposed grant from the State.

20th. At most, only so much thereof as falls within the following description, did pass, to wit: "All the right, title, interest, claim and demand which the State might hold or possess, in the Northern Division of the Central Canal, north of Morgan county, and all the rents that might or should have became due after the sale of said property; and the water power and appurtenances thereunto belonging, including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water power, structures, and all the appurtenances thereunto belonging;" and there being no testimony or evidence, other than the said description, to prove that the premises demised by the leases, came within the description, the jury cannot say that the State's sale included all that was so demised.

21st. That the jury are not authorized to determine that the sale by the State was intended to embrace all that the State had so demised, without the production of some evidence on that point.

22d. Inasmuch as by the law, land cannot be appurtenant to land, therefore, the lands demised would not pass, and did not pass to Conwell, as appurtenant to "the Northern Division of the Central Canal, north of Morgan county;" nor as appurtenant to "the bed of the canal;" nor as appurtenant to "its banks;" nor its "margins;" nor its "tow-paths;" nor its "side cuts;" nor its "feeders;" nor its "basins;" nor the "right of way;" nor the "dams;" nor the "water power;" nor the "structures," mentioned and described in the acts authorizing the sale, and in the instrument purporting to convey those things to Conwell.

23d. That there was no act of the Legislature of the State of Indiana in force when the canal and its appurtenances were sold by State authority, which gave to the purchasers or their assignees, a right to enter upon the premises leased by the State to the defendant or on those leased to defendant and Daniel Yandes; and to claim a forfeiture of the leases for non-payment of rents.

24th. That no act has been since passed by the Legislature conferring such right, which is in force at this time.

25th. The testimony adduced by the plaintiff, and in evidence, did not prove such a demand of the rents, on the first day of June, 1860, as would authorize them to consider the leases forfeited for the non-payment of rents.

Although the instructions as asked for by us, may be considered as unnecessarily prolix, and inexcusably tautological, they are believed to be not only applicable to the merits of the defence, as they were developed at the trial, but that they should have been given by the Court, and should have controlled the verdict.

They were overruled — all of them, — severally, and each; and we excepted.

Record, p. 60.

His Honor the Judge thereupon instructed the jury in such a manner as that they could scarcely fail to find a verdict for the lessors of the plaintiff, entirely ignoring the points made by us, and maintaining the opposite of our propositions.

We excepted to the instructions, as given.

Record p. 61, Exception No. 7.

In concluding, I beg to submit another suggestion, or rather an inquiry, in regard to the precise position of the lessors of the plaintiff, in reference to the lessees.

Inasmuch as the leases are renewable for another term of 30 years, on certain specified conditions, and inasmuch also, as there are other stipulations in the leases, on the part of the State, which, from their very nature cannot be complied with on the part of these claimants, has the State the power to shirk her solemn obligations to these lessees, turning them over for redress to irresponsible strangers, to treat them as they list, and arming those strangers with the keenest weapons of legal warfare, to enforce the most oppressive of all technical remedies known to the laws?

I am quite sure that my client would never have taken from any private person, a lease with such stringent conditions, which are obviously all on one side.

It is no answer to say, "let him pay his rents; he has only to do that, and he is safe, no matter who may succeed the State, as landlord."

He feels that the change has affected his interests, most materially; and that he is left without adequate redress. He is willing to pay the rents, but he claims to be indemnified for the injury he has sustained by reason of a want of the supply of water called for by the leases,—a want which could and should have been remedied long years ago,—a want proceeding solely from gross inattention and criminal remissness on the part of those whose duty it was to furnish the stipulated supply.

The lessors of the plaintiff were not obliged to resort to the rigorous remedy which they have adopted, if their object was simply to get their rents. Mr. Sheets, my client, is known to be not only responsible, but wealthy; and in another form of action, full and complete justice could be meted out to both parties.

J. MORRISON,
Attorney for Plaintiff in Error.

Of Counsel for Plaintiff in Error.

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SUPREME COURT

OF THE

UNITED STATES.

FREDERICK W. COLEMAN,

vs.

THE HUDSON RIVER BRIDGE COMPANY AT ALBANY.

RETURN ON APPEAL.

W. A. BEACH,
Solicitor for Complainant.
J. V. L. PRUYN,
Solicitor for Defendants.

TROY, N. Y.:
A. W. SCRIBNER AND CO., PRINTERS, CANNON PLACE.
1862.

SUPREME COURT

OF THE UNITED STATES. 1

FREDERICK W. COLEMAN, *Appellant*,
agst
THE HUDSON RIVER BRIDGE COMPANY, AT ALBANY, *Respondent*.

To the Honorable the Supreme Court of the United States:

The appeal of the above named Frederick W. Coleman, 2
Plaintiff and Appellant, respectfully shows: That in October, 1856, your Petitioner filed his Bill of Complaint in the Circuit Court of the United States for the Northern District of New York against the Hudson River Bridge Company, at Albany, to obtain an Injunction restraining the said Company from erecting a bridge over the Hudson River at Albany in the manner proposed and threatened by said Company, whereupon the said The Hudson River 3
Bridge Company filed their answer to said Bill. And your Petitioner further shows that the said parties took and filed their proofs herein, and upon due notice and motion before the Honorable Samuel Nelson, one of the Judges of this Court, an Injunction was issued restraining the Defendants as prayed in said Bill, until the further order of said Court.

And your Petitioner further shows, That this cause 4
came on for final hearing, upon pleadings and proofs, at a stated term of said Circuit Court held at the City Hall, in the City of Albany, in said Northern District, before the Hon. Samuel Nelson and the Hon. Nathan K. Hall, on the 18th day of October, 1859, and the said Judges

5 thereupon disagreed upon certain questions of law involved herein, and certified their disagreement to this Court. Whereupon this cause came on to be argued before this Court upon the return of the Clerk of said Circuit, duly made at a term thereof held at the City of Washington in December, 1860. And this Court, having been equally divided in opinion upon the first question so certified as aforesaid, thereupon dismissed this cause and remanded the same to the said Circuit Court, with directions to proceed
6 therewith in conformity to law, and the rules of proceeding in such cases provided; and such proceedings were thereupon had in said Circuit Court that afterwards, on the 17th day of July, 1862, the said Circuit Court made a final decree in said cause, whereby it was decreed that the said Injunction be and the same was thereby dissolved, and that the said Bill of Complaint be and the same was thereby dismissed without costs.

7 Wherefore this Appellant appeals from so much of said decree of said Circuit Court to the Supreme Court of the United States, as directs the Complainant's Bill to be dismissed and said Injunction to be dissolved; and respectfully prays that the said Decree of said Circuit Court, and the Bill, Answer, Pleadings, Depositions, Evidence, Mandate, and proceedings in the said cause may be sent to the
8 Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause, and that the said Decree of said Circuit Court, in the parts aforesaid, may be reversed, and a Decree made therein granting and directing a perpetual Injunction restraining the said Defendants as prayed in said Bill, and adjudging your Petitioner entitled to the relief in said Bill demanded, with costs, and that such other and further
9 Decree may be made by the said Supreme Court as shall be agreeable to equity and good conscience: And that this Appellant may be restored to all things which he hath lost by the said Decree. And this Appellant, as in duty bound, will ever pray, &c.

Dated July 21st, 1862. W. A. BEACH,

Solicitor, and of Counsel for Appellant.

By the Honorable SAMUEL NELSON, one of the Judges of 10
the Circuit Court of the United States for the Northern
District of New York, in the Second Circuit.

To the Hudson River Bridge Company, at Albany:

Whereas Frederick W. Coleman, Complainant, has lately appealed to the Supreme Court of the United States from parts of a Decree lately rendered in the Circuit Court of the United States for the Northern District of New York, 11
in the Second Circuit, made in favor of you, the said The Hudson River Bridge Company, at Albany, against the said Frederick W. Coleman, and has filed the security required by Law. You are, therefore, hereby cited to appear before the said Supreme Court at the City of Washington on the first Monday of December next to do and receive what may appertain to justice to be done in the 12
premises.

Given under my hand at Windsor, in the District of Vermont, in the Second Circuit, the twenty-third day of July, in the year of our Lord 1862, and of the Independence of the United States the eighty-seventh.

S. NELSON.

UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF NEW YORK. } 13

Irving Hayner, of the City of Troy, in said District, being duly sworn, says that he served a copy of the annexed Appeal and Citation on the Appellee: The Hudson River Bridge Company, at Albany, on the 25th day of July, 1862, by delivering to and leaving with John V. L. Pruyn, Esq., the Solicitor for the Defendant therein, and to Deponent known, true copies thereof, and by leaving a 14
copy of said Appeal for said Appellant in the Clerk's Office of the Circuit Court of the United States for said District, on the 26th day of July instant.

IRVING HAYNER.

Sworn to before me, this 26th }
day of July, 1862, }

A. A. BOYCE, *U. S. Clerk, and Com'r.*

15 CIRCUIT COURT OF THE UNITED STATES,
NORTHERN DISTRICT OF NEW YORK.

IN EQUITY.

FREDERICK W. COLEMAN,
v.
THE HUDSON RIVER BRIDGE COM-
16 PANY, AT ALBANY.

To the Supreme Court of the United States:

I, AUGUSTUS A. BOYCE, Clerk of the Circuit Court of the United States in and for the Northern District of New York, in the Second Circuit, having inspected the files and Records of my said office, kept by me in the City of
17 Utica, in said District, do find therein originals of which the annexed are a true copy and correct transcript of the same.

In testimony whereof, I have hereunto subscribed my name, and have hereto affixed the Seal of the said Circuit Court, at my office aforesaid, on this
[L. S.] 1st day of August, in the year of our Lord one thousand eight hundred and sixty-two, and of the Independence of the United States the eighty-
18 seventh.

A. A. BOYCE,
Clerk.

Chap. 146.

AN ACT

Authorizing the construction of a Bridge across the Hudson River at Albany.

Passed April 9, 1856, three-fifths being present.

The People of the State of New-York, represented in Senate and Assembly, do enact as follows: 1

SECTION 1. All persons who shall become stockholders pursuant to the provisions of this act, shall be and they are hereby constituted a body corporate, by the name of "The Hudson River Bridge Company at Albany," for the purpose of erecting and maintaining a bridge for the purposes of rail-road travel and transportation across the Hudson river, from some proper point on the westerly side or shore of the said 2 river, in the city of Albany, to some proper point on the opposite side or shore of the said river, in the county of Rensselaer, as may be fixed and determined upon by the commissioners hereinafter named, with all the general rights and powers of a corporation conferred by law, and with all such incidental powers as may be requisite to carry out and accomplish the objects of the corporation.

§ 2. The capital stock of the said corporation shall be five 3 hundred thousand dollars, to be divided into shares of one hundred dollars each, nor shall such capital stock exceed in amount the actual cost of said bridge and appurtenances

necessarily appertaining thereto. The said shares shall be deemed personal property, and be transferable on the books of the corporation in such manner as the directors may pro-
4 vide. Any railroad corporation may subscribe to and become the owner, with the like rights as an individual, of any part of the capital stock of the said corporation hereby created, not exceeding, however, six per cent upon the cost of the road of any such corporation so subscribing; and rails may be laid upon the said bridge for the free passage of railroad trains over the same, in such manner as the directors
5 may deem proper, and under such agreement as to compensation, and on such terms in all respects as may be agreed upon with any railroad corporation or corporations; provided, that at least fifty per cent of the amount of stock to be created under this act shall be distributed to individuals, in case so much shall be subscribed for.

§ 3. The following persons, viz: Moses H. Grinnell of the
6 city and county of New York; Joseph D. Monell, of Hudson, Columbia county; William Chamberlain, of Dutchess county; Palmer V. Kellogg, of Utica, Oneida county; Hamilton White, of Syracuse, Onondaga county; Delos De Wolf, of Oswego county; Orville V. Brainard, of Watertown, Jefferson county; Jacob Gould, of Rochester, Monroe county; James S. Wadsworth, of Geneseo, Livingston county; Albert H. Tracy, of Buffalo, Erie county; William Keep, of
7 Lockport, Niagara county; Levi Dimmick, of Broome county; Richard Franchot, of Otsego county; and Charles Courter, of Schoharie county, who are hereby appointed commissioners for that purpose, or a majority of them, may, at any time hereafter, on at least ten days' previous public notice in the state paper, receive subscriptions to the capital stock of the said corporation, at such place and under
8 such regulations in all respects as they may prescribe; and in case of an excess of subscriptions, they may apportion the stock among the subscribers, in such manner as they shall deem most likely to promote the interests of the said corporation and the speedy erection of the said bridge; and

at the time of subscribing, five dollars shall be paid on each share subscribed for, or such subscription shall not be received. The books when opened by one or more of the commissioners shall remain so, at least through the business 9
hours of the day, so that all persons may have a fair opportunity of becoming subscribers.

§ 4. As soon as the stock to the amount of five hundred thousand dollars shall be subscribed for, the said commissioners, or a majority of them, shall, without delay, give fifteen days notice, by advertisement in the state paper, of their intention to locate said bridge; and after the publi- 10
cation of said notice, shall, without delay, proceed to locate the place where the said bridge shall be constructed, and sign a certificate of such location, and file the same in the office of the clerk of the county of Albany; and after said location is agreed upon by said commissioners, or a majority of them, they shall fix the time and place for holding the first election of directors of the said corporation, and 11
shall give notice thereof, in the state paper, for at least thirty days previous thereto, and shall also appoint three of the subscribers to the stock, inspectors of the first election, which shall be held by the said inspectors, or such of them as may attend, and be conducted as required by law; and at every election of directors, each stockholder shall have one vote for each share of stock held by such stockholder, and may vote in person or by proxy; and all votes 12
at every such election shall be by ballot.

§ 5. The said commissioners hereinbefore named, shall have power to cause such examinations and surveys to be made as may be necessary in their judgment for the selection of the most advantageous site for the said bridge, and the avenues and approaches leading to and from the same; and for such purpose, the commissioners, or the corpora- 13
tion hereby created, shall have power to appoint an engineer, agents or officers, who are authorised to enter upon the lands or waters of any person for such purpose, but subject to proper responsibility for all damages which they

may do thereto; all the powers and duties of the said commissioners may be exercised by a majority of their number.

14 § 6. The directors of the said corporation shall be nine in number, and be elected annually from the stockholders, at such time and place as the directors may appoint, of which public notice shall be given in the state paper, at least ten days previously; at such election of directors, inspectors of the next election for directors shall be chosen by the stockholders, by ballot, from among their own number.

15 § 7. The directors shall appoint one of their number as president of the said corporation, and they may also from time to time appoint such other officers and agents as they may deem necessary. They may also require payment of the amount remaining unpaid on the stock of the said corporation, giving at least thirty days' previous notice of such call, in two newspapers published in the said city of 16 Albany, under the penalty, in case of non-payment, of forfeiture of the said stock, and of all previous payments made thereon, for the benefit of the said corporation. The said directors may also from time to time ordain and establish such by-laws and adopt such measures as they may deem proper to further the interests of the corporation and to promote the speedy construction of the said 17 bridge. All vacancies happening in the board of directors, by resignation, death or otherwise, may be filled by the board.

§ 8. The bridge across the Hudson River, which the said corporation are hereby authorised to erect, shall be constructed at an elevation at least twenty feet above common tide water, so as to allow under it the free passage of canal 18 boats and barges without masts, and with a draw therein of sufficient width to admit the free passage of the largest vessels navigating the said river, and at least two hundred feet in width, or of two draws of at least one hundred and fifty feet each, which draws shall not be obstructed by

piers or otherwise, and in such a manner as to cause no substantial impediment or obstruction to the free navigation of the said river. And the said corporation hereby created shall, at all times during the season of navigation, 19
cause the said draw to be opened, and kept open, except for the passage of railroad trains of cars, and shut whenever the same may be necessary; and boats or vessels wishing to pass such draw shall at all times have a preference over railroad trains of cars or engines, and such draw shall be promptly opened to any such boat or vessel, on signal, if given before any railroad train or engine shall 20
have appeared and given signal of their intention to pass; and shall at all times keep in readiness one or more steamboats or steam tugs, suitable for towing said vessels through said draw, and shall tow all sail vessels through said draw, whenever requested so to do by the officers of such sail vessel, on their regular passage up or down the river, without charge, and shall afford such other facilities 21
as may, in the judgment of the canal board, be requisite in passing through the said draw without hindrance or delay; and for any unnecessary delay or refusal in opening or shutting the said draw, the said corporation shall be liable to pay treble damages to any party aggrieved thereby. From sundown to sunrise, during the season of navigation, suitable lights shall be maintained upon such bridge, to 22
guide vessels approaching the draw; and the said company shall be liable to pay owners of any steamboats or vessels, or the cargo thereof, all damages which they may sustain by reason of any neglect of the provisions of this section.

§ 9. The said corporation shall not suffer any bars or obstructions, which may be formed by reason of the said 23
bridge or the piers thereof, to remain in said river, so as at any time to hinder or impede the free navigation thereof; and for any wilful neglect in this particular, the said corporation shall be liable to a penalty of five hundred dollars

to the people of the state, and pay to the party aggrieved or injured thereby, such damages as he may have sustained.

§ 10. The said company shall have the right to take and
24 hold all real estate necessary for the erection of the said bridge, and the piers, toll-houses and other appurtenances thereof, and for all necessary avenues or approaches leading to or from the same, and may occupy and use the bed of the river for the said bridge, its piers and appurtenances, as far as may be necessary.

§ 11. Should the said company require any real estate
25 for the erection of the said bridge, or for any of the purposes of its corporation, and be unable for any reason to agree with the owner thereof for its purchase, it shall have the right to acquire title to such real estate in the same manner and by the like special proceeding as are authorised and provided for obtaining title to real estate, required for the purpose of a railroad corporation, under the fourteenth
26 section of the act entitled "An act to authorise the formation of railroad corporations, and to regulate the same," passed April second, one thousand eight hundred and fifty, and the other sections of the said act relative thereto, and any act or acts amendatory thereof, or in addition thereto; and for that purpose all such acts shall be considered as applicable to the corporation hereby created, as far as may
27 be, in like manner as if it were named therein; and such modifications may be made in the formal part of the proceeedings, in order to apply the same to the corporation hereby created, instead of a railroad corporation, as shall be approved of by the supreme court; and the said court may make such orders and regulations as to the mode and manner of conducting the proceedings, and all things rela-
28 tive thereto, so as to effectuate and make the same valid for acquiring title to such real estate, as to the said court may seem proper; and the title thus acquired by the said corporation shall vest in it the fee simple of the said lands; and the said court may, on sufficient cause shown, and on proof of payment or tender of the amount to be paid for

any parcel of such real estate in such manner as may have been required by the said court, issue summary process, in such form as may be deemed proper, to the sheriff of the proper county, commanding him, without delay, to put the 29
said corporation, by its proper agents, in the possession of such real estate, and to enforce such process in such manner as may be conformable to law.

§ 12. After the said bridge shall have been completed, such tolls and charges may be collected for crossing the same on foot, and with wagons, cars or carriages of any kind, and with horses or other animals, or otherwise, as the directors 30
may from time to time establish, subject to the approval of the canal board, provided, however, that such tolls shall be so regulated that they shall not yield a net income to exceed ten per cent upon the amount of such capital stock; and any person crossing or attempting to cross said bridge without paying the proper toll, shall be subject to a penalty of ten dollars, in addition to three times the amount of toll such 31
person or persons ought to have paid.

§ 13. Any person wilfully doing any injury to the said bridge, or to any of the appurtenances thereof, shall forfeit and pay to the said corporation three times the amount of such injury, and shall be considered guilty of a misdemeanor, and be subject to a penalty not exceeding five hundred dollars, and to imprisonment not exceeding six months, in 32
the discretion of the court.

§ 14. All the stockholders under this act shall be severally and individually liable, to an amount equal to the amount of the capital stock held by them respectively, to the creditors of such company for all the debts contracted by the directors or agents of such company for its use, until the whole amount of the capital stock of said company is paid in, or as 33
much thereof as shall be deemed sufficient for the erection of said bridge, and the purchase of the necessary real estate, and a certificate thereof filed in the office of the clerk of the county of Albany, and the whole capital stock paid in shall be one-half thereof within two years, and the other half

within three years, from the time of the incorporation of said company. If the directors of said corporation shall contract debts for the company exceeding in aggregate the
34 amount of the capital stock, they shall be personally liable for all the debts of the corporation.

§ 15. This corporation shall possess the general powers and be subject to the provisions contained in title third, of chapter eighteen, of the first part of the Revised Statutes, so far as the same are applicable and have not been repealed.

§ 16. Any railroad corporation whose road now has or
35 shall have a terminus at, or shall run its trains to or from said city of Albany or East Albany, or shall run its trains in connection with any road having such terminus, shall be permitted to use said bridge for railroad purposes upon such terms as the directors of the several companies interested may agree, and in case they shall not be able to agree, the terms shall be fixed by the canal board.

36 § 17. This act shall take effect immediately.

STATE OF NEW YORK, }
Secretary's Office. }

I have compared the preceding with the original law on file in this office, and do certify that the same is a correct transcript therefrom, and of the whole of said original-

J. T. HEADLEY,
37 *Secretary of State.*

AN ACT

To amend an Act entittled an Act to incorporate the Hudson River Bridge Company at Albany, passed April 9th, 1856.

PASSED April 14th, 1857.

38 *The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

SECTION 1. Instead of constructing their bridge with a draw or draws therein, of the dimensions specified in the eighth section of chapter one hundred and forty-six, of the

laws of eighteen hundred and fifty-six, the Hudson River Bridge company at Albany, may construct the said bridge with a draw therein of such dimensions as the State Engineer and Surveyor of the State of New York, John B. Jervis, and Oliver H. Lee, Civil Engineers, or a majority of them, shall determine, and of sufficient width to admit the free passage of the largest vessels navigating the Hudson River, and at least one hundred and eighty feet in width, or with two draws therein of at least one hundred and ten feet each in clear width. The determination of said engineers shall be reduced to writing, and be signed by them and filed in the office of the Clerk of the County of Albany.

§ 2. In case of death, resignation, neglect or inability of the persons before mentioned, or either of them, to serve or act as aforesaid, the Supreme Court, at special term, may, on the application of the said company, appoint other persons, who shall be practical Civil Engineers, to serve and act in their places, and with the powers mentioned in the first section of this act.

§ 3. This act shall take effect immediately.

STATE OF NEW YORK, } ss.
Secretary's Office. }

I have compared the preceding with the original law on file in this office and do hereby certify the same to be a correct transcript therefrom and of the whole of said original law.

Given under my hand and seal of office, at the city of Albany, the fifteenth day of April in the year eighteen hundred and fifty-seven.

[L. S.]

N. P. STANTON,
Deputy Secretary of State.

In pursuance of an act of the Legislature of the State of New York, passed April 14th 1857, entitled "An Act to amend an Act to incorporate the Hudson River Bridge

Company at Albany, passed April 9th 1856." We, Silas Seymour, State Engineer and Surveyor of the State of New York, and John B. Jervis and Oliver H. Lee, civil engineers
44 mentioned in said Act, met together in the city of Albany at the office of said Bridge Company, on the 27th day of May, one thousand eight hundred and fifty-seven, for the purpose of discharging the duty imposed upon us by said Act, and after due consideration of the subject, we did determine that the said Hudson River Bridge Company at Albany may construct the Bridge authorised by said Acts,
45 with one draw therein of one hundred and eighty feet clear width, or with two draws therein of at least one hundred and ten feet each in clear width as said company may determine.

And we do further determine that the draw or draws in a bridge so constructed will be of sufficient width to admit of the passage of the largest vessels navigating the Hudson
46 river.

In witness whereof, and in pursuance of the said Act, we have reduced our said determination to writing, and hereby sign the same. Dated Albany May 27th, 1857.

(Signed) S. SEYMOUR,
State Engineer and Surveyor.

JOHN B. JERVIS, } *Civil Engineers.*
OLIVER H. LEE, }

47

ROBERT D. SILLIMAN,
agst.
THE HUDSON RIVER BRIDGE COMPANY AT ALBANY

To the Honorable the Judges of the Circuit Court of the United States, for the Northern District of New York:

48 Your Orator, Robert D. Silliman, a resident of the city of Troy, in the county of Rensselaer, and the State of New York, and a Citizen of the United States, brings this his Bill of Complaint, against the Hudson River Bridge Company at Albany, a Corporation created and established

under and by virtue of an Act of the Legislature of the State of New York, entitled "An Act authorizing the construction of a Bridge across the Hudson River "at Albany," passed April 9th, 1856, a copy of which is hereto annexed 49
marked "A," and which your Orator prays may be regarded as part of his Complaint.

And thereupon your Orator complains and shows, that he is now the part owner of Seven Barges called respectively the Gurdon Grant, the R. D. Silliman, the L. P. Gardiner, the T. F. Davis, the Castleton, the N. E. Edmonds, and the A. S. Perry, carrying Twenty-one Hundred Tons 50
in the aggregate, Custom House measurement That said Barges are and for several years past have been duly enrolled and licensed to carry on the Coasting Trade, at the said City of Troy, which then was and is a Port of Delivery, duly established under the Acts of Congress in that behalf. That said enrollments and licenses were duly made and granted under an Act of Congress entitled "An 51
Act for enrolling and licensing Ships and Vessels to be employed in the Coasting Trade, and for "regulating the same."

Your Orator further shows, that said Barges are and each of them is provided with a mast essential to their convenient and profitable use, the height of which, above 52
the keelson of the vessel, varies from fifty-five to seventy feet.

Your Orator further shows, that under said licenses, your Orator, as part owner, has been since the granting thereof, and for several years last past, and now is regularly engaged in carrying on a Coasting Trade with said Vessels between said Port of Troy and the Ports of Albany and New York in said State of New York, and in said business and 53
under said authority has, during the time aforesaid, been accustomed to navigate the said Hudson River from its mouth, up to the City of Troy aforesaid, the latter during said time, and still being, a Port of Delivery, under and by virtue of the Laws of Congress in that behalf provided,

and carrying thereto and therefrom, upon said Vessels, cargoes of Produce, Merchandise, Grain, and other commodities, which were received at and landed upon the wharves
54 and quays at said Port of Troy. And your Orator intends to prosecute and continue said business in manner as aforesaid.

Your Orator further says, that he has been a resident of the said City of Troy for forty years and upwards. That for more than Thirty years he has been engaged, as Master or part owner, in navigating the said Hudson River be-
55 tween Troy and New-York aforesaid, with the various kinds of Vessels used thereon. That he is now engaged in an extensive business in said City, dependant, for its prosperity, upon the unobstructed navigation of said River, and that he is the owner of considerable property, both real and personal, located in the said City of Troy, the value of which will be greatly and irretrievably impaired by any permanent ob-
56 struction to the Commerce and Navigation of said Stream.

Your Orator further shows, that the said City of Albany is a Port of Delivery under the Laws aforesaid, and is situated upon the Western shore of said Hudson River, about six miles below said Port of Troy located on the Eastern bank of said River, and that the tide ebbs and flows up to and within the said City of Troy.

57 Your Orator further shows, upon information and belief, that under the Third Section of said Act of the Legislature of the State of New York, the persons therein named have received subscriptions to the Capital Stock of the Corporation authorized by said Act, that the whole of the Capital Stock has been subscribed; and that under the provisions of said Act, the site of the Bridge thereby authorized, has been established, and a Certificate of the location thereof has
58 been made and filed, under said Act, in the office of the Clerk of the City of Albany, of which the following is a copy:

"WHEREAS, by an Act of the Legislature of the State of New York, entitled 'An Act authorizing the construction of

a Bridge across the Hudson River at Albany,' passed April 9th, 1856, all persons who should become stockholders, pursuant to the provisions of the said Act, were thereby constituted a body corporate, by the name of "The Hudson River Bridge Company at Albany," for the purpose of erecting and maintaining a Bridge for the purposes of Railroad travel and transportion across the Hudson River, from some proper point on the westerly side or shore of the said River in the City of Albany, to some proper point on the opposite side or shore of the said River in the County of Rensselaer, as might be fixed and determined upon by the Commissioners named in said Act.

"And whereas, the Capital Stock of the Corporation created by the said Act was thereby fixed at the sum of Five Hundred Thousand Dollars, and divided into shares of One Hundred Dollars each, and by the third section of said Act, Moses H. Grinnell, of the City and County of New York, Joseph D. Monell, of the City of Hudson, Columbia County, William Chamberlain, of Dutchess County, Palmer V. Kellogg, of Utica, Oneida County, Hamilton White, of Syracuse, Onondaga County, Delos De Wolf, of Oswego County, Orville V. Brainerd, of Watertown, Jefferson County, Jacob Gould, of Rochester, Monroe County, James S. Wadsworth, of Genesee, Livingston County, Albert H. Tracy, of Buffalo, Erie County, William Keep, of Lockport, Niagara County, Levi Dimmick, of Broome County, Richard Franchot, of Otsego County, and Charles Courter, of Schoharie County, were thereby appointed Commissioners for the purposes of the said act; and they or a majority of them were authorized at any time thereafter, on at least ten days previous public notice in the State Paper, to receive subscriptions to the capital stock of the said corporation, at such place and under such regulations, in all respects, as they should prescribe, and at the time of subscription Five Dollars upon each share prescribed for was required to be paid, or such subscription should not be received.

"And whereas, in and by the fourth section of the said act, it was provided, that as soon as the stock to the amount
64 of five hundred thousand dollars should be subscribed for, the said Commissioners or a majority of them, should without delay, give fifteen days' notice, by advertisement in the State Paper, of their intention to locate the said bridge, and after the publication of the said notice, should, without delay, proceed to locate the place where the said bridge shall be constructed, and sign a certificate of such location, and
65 file the same in the office of the Clerk of the County of Albany, and after the said location should be agreed upon by the said Commissioners, or a majority of them, they should fix the time and place for holding the first election of Directors of the said Corporation, and should give notice thereof in the State Paper, for at least thirty days previous thereto, and should appoint three of the subscribers to the said
66 stock inspectors of the first election, which should be held by said inspectors, or such of them as might attend, and that said election be conducted as required by law. And it was therein further provided, that all the powers and duties of the said Commissioners might be exercised by a majority of their number.

"And whereas, in pursuance of the authority conferred
67 by the provisions of the said act, the Commissioners named therein, did, on the sixth day of May, one thousand eight hundred and fifty-six, meet together in the Exchange Building in the City of Albany, and thereupon caused public notice to be given, that they the said Commissioners would meet together at the Rotunda of the Exchange Building in the City of Albany, on the twenty-fifth day of June, one thousand eight hundred and fifty-six, at nine o'clock in the forenoon
68 of that day, to receive subscriptions to the capital stock of the said Corporation, in pursuance of the said act, which notice, signed by the said Commissioners was duly published in the State Paper for the time, and in the manner required in the said act.

"And whereas, on the said twenty-fifth day of June, one thousand eight hundred and fifty-six, at the Rotunda of the said Exchange Building in the city of Albany, in pursuance 69
of the said act, and of said notice, the said Commissioners again met, and thereupon proceeded to open the Books and receive subscriptions to the Capital Stock of the said Corporation, which Books of Subscription were opened at nine o'clock in the forenoon, and remained opened during the business hours of that day, as required by said Act, and during which time the said Commissioners received subscriptions to the said Stock to the full amount of Five Hundred 70
Thousand Dollars, being all the subscriptions made to said Capital Stock, and received a payment in cash of Five Dollars upon each and every share of the Stock so subscribed for.

"And whereas, the full amount of said Capital Stock of said Corporation having been subscribed for in pursuance 71
of the provisions of said Act, the said Commissioners did, on the day aforesaid, cause notice to be given that they would meet at the Rotunda in the Exchange Building in the City of Albany, on the 22d day of July, 1856, at eleven o'clock in the forenoon of that day, for the purpose of locating said Bridge, and would then and there proceed to locate the place where such Bridge should be constructed, which no- 72
tice, signed by the said Commissioners, was published daily in the State Paper as required by said Act.

"And whereas, the said Commissioners did, in pursuance of the said Act, and of said notice, meet together at the Rotunda of the said Exchange Building in the City of Albany, on the said Twenty-Second day of July, 1856, for the purpose of locating the said bridge, and having then and there 73
proceeded to consider the question of such location, but without finally determining the same, and for the purpose of procuring further information, adjourned the said meeting to the twentieth day of August, 1856, at eleven o'clock in the forenoon, at the Rotunda in said Exchange Building

in the City of Albany, and notice of such adjourned meeting was, on the same day, published in the State paper, and
74 daily, until the said twentieth day of August, 1856.

"And whereas, on the day, and at the place last mentioned, the said Commissioners again met, and having further considered the question of the location of said bridge, but without concluding the same, continued their meeting at the same place, until and including the twenty-first day of August, 1856.

75 "At which day and place last mentioned, to wit, the twenty-first day of August, one thousand eight hundred and fifty-six, at the Exchange in the City of Albany, the undersigned Commissioners, again met together, and having made and caused to be made all necessary surveys and examinations in the premises, and having been furnished with maps and profiles of the lines and elevations for the proposed location of said bridge, and heard the representations of various par-
76 ties in regard thereto, and having duly considered the same, did proceed to locate the place where said bridge shall be constructed, and by virtue of the power of authority conferred upon them by the said act, do hereby determine and locate the place where the said bridge shall be constructed, as follows, to wit:

" The westerly end of the said bridge shall be located at
77 the foot of Exchange street, in the city of Albany, on the westerly side or shore of the Hudson river, and the easterly end of said bridge shall be located on the easterly side or shore of said river, at a point on the easterly branch of said river, commonly called Van Ransselaer Creek, two hundred and fifty-five feet southerly from the centre of Partition street, in Greenbush, in the county of Rensselaer,
78 the said bridge to cross the main channel of the river by a straight line nearly at right angles thereto, and connected with the said points on the easterly and westerly side of the river by suitable curved lines to accomodate and render convenient the approach to said bridge; and we the said commissioners, in pursuance of the provisions of the

said act, have made and signed this certificate of such location, and direct the same to be filed in the office of the clerk of Rensselaer county as required by said act.

"And in pursuance of the provisions of said act, we do hereby fix and appoint the twenty-fourth day of September, one thousand eight hundred and fifty-six, at twelve o'clock at noon of that day, as the time, and the Rotunda of the Exchange building in the city of Albany as the place, for holding the first election of directors of the said corporation; and do direct that the polls at said election be kept open from 12 o'clock at noon until 2 o'clock in the afternoon of the said day, and that notice of such election be published pursuant to the provisions of the fourth section of said act.

"And we do hereby, in pursuance of said act, appoint Gerritt Y. Lansing, of Albany, Palmer V. Kellogg, of Utica, Alexander H. Schultz, of Fishkill, three of the subscribers to the capital stock of the said corporation, as inspectors of said election, and direct that they or such of them as may attend, hold the said election, and conduct the same as required by law.

"In witness whereof, we the undersigned, commissioners, have hereunto subscribed our names this twenty-first day of August, one thousand eight hundred and fifty-six.

JACOB GOULD,	DELOS DE WOLF,
PALMER V. KELLOGG,	LEVI DIMMICK,
JOS. D. MONELL,	CHARLES COULTER,
ALBERT H. TRACY,	O. V. BRAINERD,
WM. CHAMBERLAIN,	RICHARD FRANCHOT,

WILLIAM KEEP."

STATE OF NEW YORK, } *ss.*
City of Albany. }

On this twenty-first day of August, in the year one thousand eight hundred and fifty-six, before me the subscriber personally came Jacob Gould, Palmer V. Kellogg, Joseph

D. Monell, Albert H. Tracy, William Chamberlain, William Keep, Delos De Wolf, Levi Dimmick, Charles Courter,
84 Orville V. Brainard and Richard Franchot, to me known to be the individuals described in, and who executed the foregoing Certificate, and they severally, each for himself, acknowledged that they executed the same.

Filed August 21st, 1856.

J. STERNBERGH,
Commissioner of Deeds.

85 And your Orator further shows, that the first Directors of the said Corporation have been elected, and the said Corporation has become organized under said Act, and is preparing to construct and maintain said bridge at or near the place aforesaid, and threatens and intends so to do.

Your Orator further shows, that the defendant is making preparation and threatens and intends to erect said bridge
86 across said river upon massive stone piers, several of which, as your Orator is informed and believes, of about twenty feet in breadth, are designed to be placed in the main channel of said river, and in the direct, ordinary, and necessary course of commerce and navigation thereupon; and that at least two of said piers, upon which the draw or draws required by said Act shall operate, must necessarily be of much larger dimensions than aforesaid, and that the
87 defandants do not intend to elevate said bridge materially, or any more than twenty feet above common tide water. But your Orator is ignorant of the precise plan or mode the defendants intend to adopt and use in the construction of said bridge, and your orator prays that the said defendants may fully and minutely disclose and set forth the same in their answer hereto. But your Orator charges
88 that the said defendants threaten and intend to erect said bridge at an elevation of not more than twenty feet above common tide water, and not sufficiently elevated above said stream as to admit the passage thereunder of the

steamers, masted vessels, barges and tows daily accustomed to pass the said location.

Your Orator charges and shows, that the erection and 89
maintenance of said bridge, across said river, in the manner intended and threatened by the said defendants, will essentially obstruct the navigation of said river, and materially hinder and prevent your Orator and other citizens of the United States from passing along the same as they have hitherto been accustomed to do, and will greatly interfere with and limit the use and enjoyment, as well of 90
the license so as aforesaid granted to your Orator, as of like licenses granted under the laws of Congress to various of the citizens of the United States, and will hinder and obstruct the subjects of foreign government and countries in the exercise of their rights of commerce and navigation, and will increase to all persons the difficulties, hazard and expense of navigating said river, by any and all varieties 91
of craft, and derange, interrupt, and diminish the trade, commerce and business of your Orator, and of the citizens of the United States, upon said river, to the common nuisance, and their irreparable injury.

And your Orator further shows, upon information and belief, that the bed of the said Hudson River at, and above and below the proposed site of said bridge, and between the cities of Troy and Albany, is of light, unstable sand, 92
which is moved by the slightest action of the water, and by its irregular deposits, yearly interrupts and changes the channel of said river at the places aforesaid. That the said river, at the city of Albany and its vicinity, is subject to heavy annual freshets, which uniformly disturb and vary its channel. That at the opening of the river in spring time, immense and dangerous dams of ice are formed at or 93
near said city of Albany, which entirely interrupt the flow of the river in the ordinary channel, and create great and serious alterations in the bed of the stream. That for many years the city of Troy has, for much of each year, employed a steam Dredge in clearing and preserving the

channel between said city and Albany, from the changes and obstructions caused as aforesaid; and that the una-
94 voidable effect of said bridge, and its piers and foundations, will be to fill the channel of said river with sand-bars, and make the same intricate and fluctuating, beyond the possibility of avoidance or reformation by the means indicated in said Act of the Legislature of the State of New York, or otherwise, so as to prevent a destructive interruption of
95 the commerce and navigation of said river.

Your Orator further shows, that influenced by the commercial and national importance of said river, and possessing an extensive and costly fortification and Arsenal, located on the banks of said stream, opposite the city of Troy, the Government of the United States has, from time to time, made large appropriations for the improvement of the navigation of said river, and several hundred thousand
96 dollars have recently been expended thereunder, for that purpose, between the cities of Troy and Albany, and above the proposed site for said bridge.

Your Orator further shows, upon information and belief, that the city of Troy contains a population of near forty thousand inhabitants; that it maintains manufacturing enterprises of unusual extent and importance, and conducts
97 a commerce of great variety, expansion and prosperity. That the villages of West Troy and Green Island, immediately opposite, contain a population of about seven thousand, employing a large capital in manufactories and the lumber trade, and the commerce incident thereto. That the Erie and Champlain canal unite with said river at West Troy aforesaid, and that a large proportion of the
98 products arriving at tide-water by said canals, are there locked into said river, and that the proposed location of said bridge, crosses the Canal Basin at Albany below the outlet of said canals. And your Orator says that the construction and maintenance of said bridge will inflict great and irremediable injury upon each and every of the interests aforesaid.

Your Orator further shows, upon information and belief, that the full breadth of said river, opposite the whole extent 99
of the said city of Albany, is inadequate to the accommodation of the commerce and navigation conducted at and passing that locality. That the contemplated enlargement of the Erie canal, the rapid increase in the population of the Western States, and in the facilities for transportation, must inevitably and speedily magnify the vast trade which touches tide-water at Troy and Albany, and passes upon said river to the seaboard. And your Orator charges that 100
the erection of a bridge across said river, at the city of Albany, or the placing of any abutment or pier therein, will inevitably and seriously incommode said trade, diminish its extent, and increase the expenses and hazards of its prosecution.

And your Orator charges, upon information and belief, that the precautionary measures provided by the said Act 101
authorising said bridge, professedly to divert or diminish the injury to navigation apprehended from the construction of the same, will prove entirely inefficient to secure the rights of your Orator aforesaid, or to protect such navigation from irreparable injury. That from the extent of such navigation, and the nature of said river, it is impracticable to construct any form of draw bridge, or provide any 102
guards or appliances connected therewith, so as to avoid a material obstruction to the navigation of said river, except in the form of a Suspension Bridge, sufficiently elevated to admit the passage thereunder of all vessels accustomed to navigate said waters.

And your Orator further says, that there is no public necessity demanding the said bridge, or any bridge at the 103
city of Albany. That the exigences and convenience of general and local commerce and trade, and public travel, are fully accommodated by existing facilities, and that if otherwise, it is entirely unnecessary to inflict upon the

aforesaid commercial and property interests, the incalculable evil of said bridge.

104 And your Orator well hoped that he and the citizens of the United States navigating said river, would have been permitted to remain in the free and unobstructed use of the same, and that the defendants would have refrained from intruding upon the rights of your Orator and said citizens, and from obstructing the navigation of said stream.

But the said defendants disregarding their duty, threaten
105 to erect said bridge and to continue the same, or some bridge across said river, at the said city of Albany, similar to that above mentioned, and which will produce the several injuries hereinbefore described.

In consideration whereof, and inasmuch as your Orator can obtain no adequate remedy in the courts of common law, and to the end that the defendants may answer the premises, and that the said Act of the Legislature of the
106 State of New York authorising the construction of a bridge across the said Hudson River, may be decreed by this Honorable Court unconstitutional and void. And that the said defendants may be restrained, by the order and decree of this court, from erecting the said proposed bridge, and from erecting any bridge over the tidewater of said river, or below the said city of Troy, by which any permanent structure shall be placed in said river, or be placed over
107 the same, unless elevated above the ordinary height, at all stages of the water, of the masts and chimneys of the various craft navigating the same. And that your Orator may be protected in the enjoyment of the free navigation of said river, and may have such other and further relief as to your Honors shall seem meet, and agreeable to equity.

May it please your Honors to grant to your Orator a
108 writ of injunction issuing out of this court, directed to the said The Hudson River Bridge Company at Albany, restraining and preventing them, their servants and agents, from erecting or proceeding to erect any bridge over or

across the Hudson River at or opposite the city of Albany, and from placing thereat any abutment, pier or permanent structure, or any erection over the said river, unless elevated above the heighth, at all stages of the water, of the tallest masts and steam chimneys accustomed to navigate 109
said river, and from placing in, upon or over said river at or opposite said city of Albany, any impediment to the free and natural flow of the waters thereof, or to the uninterrupted navigation of the same; and also the writ of Subpœna to be directed to the said defendants, commanding them at a certain day and under a certain penalty 110
therein to be limited, to appear before this Honorable Court, and then and there full, true and perfect answer make to all and singular the premises, and further to stand to, perform and abide such further order and decree herein, as to your Honors shall seem meet. And your Orator will ever pray, &c.
111

UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF NEW YORK, } ss.

On this second day of October, one thousand eight hundred and fifty-six, Robert D. Silliman, the complainant in the foregoing bill of complaint, came before me, and having signed the same, and being by me duly sworn, did 112
depose and say, that he had read the said bill, and knew the contents thereof, and that the same was true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believed it to be true.

R. J. HILTON, *United States Commissioner,*
for Northern District of New York. 113

ROBERT D. SILLIMAN,
agst.
THE HUDSON RIVER BRIDGE COMPANY AT ALBANY. } ***In Equity.***

114

To the Honorable the Judges of the Circuit Court of the United States, for the Northern District of New York:

The answer of the Hudson River Bridge Company at Albany, the defendant, to the bill of complaint, of Robert D. Silliman, plaintiff.

115 This defendant reserving to itself all benefits of exception to the manifold errors and insufficiencies in the said bill of complaint contained for answer thereunto, or unto so much and such parts thereof, as the defendant is advised, it is material or necessary for it to make answer thereto, answering, says that, this defendant admits that the complainant is a resident of the city of Troy, in the county of 116 Rensselaer, and State of New York, and a citizen of the United States, and that this defendant is a corporation created and established under and by virtue of an act of the Legislature of the State of New York, entitled "An Act authorizing the construction of a bridge across the Hudson river at Albany," passed April 9th, 1856, a printed copy whereof is annexed to the said bill of complaint.

And this defendant further answering says, that whether 117 the complainant in said bill named, is now part owner of seven barges, called respectively the Gurdon Grant, the R. D. Silliman, the L. P. Gardiner, and T. F. Davis, the Castleton, the N. E. Edmonds and the A. S. Perry, carrying twenty-one hundred tons in the aggregate, Custom House measurement, it does not know, and is not informed save 118 by the said bill of complaint, and the defendant therefore leaves the complainant to make such proof thereof as he may be advised.

And this defendant further answers and admits that the city of Troy, is a port of delivery duly established under acts of Congress of the United States, but whether the said

barges mentioned in the bill are, or for several years have been, duly enrolled and licensed at said city of Troy, to carry on the coasting trade, or whether said enrollments and licenses were duly made and granted under an act of 119
Congress, entitled "An Act for enrolling and licensing ships and vessels, to be employed in the coasting trade, and for regulating the same, this defendant does not know, and is not informed, save by the bill of complaint, and therefore leaves the complainant to make such proof thereof as he may be advised.

120

And this defendant further answering upon information and belief, denies that each or any of the barges mentioned in the bill of complaint, is provided with a mast which is essential to their convenient and profitable use of the height stated in the bill, or with any mast or masts of any height or description whatever.

And this defendant avers upon like information and belief that the barges referred to in the bill, are neither of 121
them sailing vessels.

And this defendant further answering says, that whether the complainant, as part owner or otherwise, under the licenses mentioned in the bill, or under any licenses, has been since the granting thereof, and for several years past, or is now regularly engaged in carrying on a coasting trade, 122
or any trade, with said vessels or any of them between the port of Troy, and the ports of Albany and New York, in the State of New York, or whether in said business, and under said authority, the said complainant has during the time alleged been accustomed to navigate the Hudson river, from its mouth up to the city of Troy, then being a port of delivery, and in carrying thereto and therefrom, upon the 123
said vessels, cargoes of produce, merchandise, grain and other commodities which were received and landed upon the wharves and quays at said port of Troy, or whether the said complainant intends to prosecute and continue said business, in the manner stated, this defendant is igno-

rant, and does not know, and is not informed save by the bill of complaint, and therefore leaves the said complain-
124 ant to make such proof thereof, as he may be advised, it is material and necessary for him to make in this behalf.

And this defendant further answering says, that whether the said complainant has been for more than thirty years engaged as master or part owner or otherwise, in navigating the Hudson river between Troy and New York, with
125 the various kinds of vessels used thereon, or whether the said complainant is now engaged in an extensive business in the city of Troy, dependent for its prosperity upon the unobstructed navigation of the Hudson river, or whether he is the owner of considerable property real and personal located in said city of Troy, the value of which will be greatly and irretrievably impaired by any permanent ob-
126 struction to the commerce and navigation of said stream, this defendant is also ignorant and does not know, and is not informed, save by the said bill of complaint, and therefore leaves the complainant to make such proof thereof as he may be advised.

And this defendant further answering admits, that the city of Albany is a port of delivery under the laws of Con-
127 gress and is situated upon the western shore of the Hudson river, about six miles below the said city of Troy, which is located on the eastern bank of said river, and that the tide ebbs and flows up to the city of Troy; but this defendant avers that the tides at the city of Troy, or above Albany, are quite inconsiderable and do not ordinarily raise the water beyond ten or twelve inches.

And this defendant further answering admits, that under
128 the provisions of the act of the legislature of the state of New York, herebefore referred to, the persons named therein, have received subscriptions to the capital stock of the corporation, thereby authorised; that the whole of said capital stock has been subscribed, and that under the provisions of the said act, the site of the bridge thereby autho-

rised has been established, and a certificate of the location thereof has been made and filed, in pursuance of the provisions of the said act, in the office of the clerk of the county of Albany, and that a substantial copy of said cer- 129
tificate is contained in said bill of complaint.

And this defendant further answering admits, that directors have been duly elected, and that this defendant is duly organised as a corporation under the said act of the legislature of the state of New York; and this defendant admits that it has made some preliminary preparations, in the way of making examinations and obtaining necessary in- 130
formation, but not otherwise, and intends, pursuant to the provisions of the said act of the legislature, and strictly in accordance with the authority therein and thereby granted, to construct and maintain a bridge at the place of its location, as this defendant insists it has the legal right and authority to do.

And this defendant further answering denies, that it is making preparation, or threatens, or intends to erect said 131
bridge across said river upon massive stone piers, several of which, of about twenty feet in breadth, are designed to be placed in the main channel of said river, and in the direct ordinary and necessary course of commerce and navigation thereupon, or that at least two of said piers upon which the draw or draws required by said act shall operate, are to be of much larger dimensions than twenty feet in 132
breadth, or that this defendant does not intend to elevate said bridge materially or any more than twenty feet above common tide, and in relation thereto this defendant says, that it has not fixed or determined upon any precise place for the construction of said bridge, nor has it determined the size, number or location of piers to be erected upon which said bridge shall rest, or how high it shall be elevated above common tide, and hence this defendant can not 133
set forth the precise plan of the bridge to be erected as aforesaid, but this defendant does not intend to erect any

bridge, except strictly pursuant to the provisions of its charter in every respect, and which shall not materially
134 impede or obstruct the navigation of the river.

And this defendant further answering, denies that it has threatened or intended, or does threaten or intend, to erect said bridge at an elevation not more than twenty feet above common tide water, or one that is not of the elevation required by its charter, and whether steamers, masted vessels, barges and tows daily accustomed to pass the location of said
135 bridge, will all be able to pass under said bridge when so erected in pursuance of said charter, must depend upon the elevation of said bridge as finally determined upon by this defendant, and upon the character of the steamers, masted vessels, barges and tows which may have occasion to pass the same; and this defendant can neither admit nor deny the allegation in said bill in that behalf made, and leaves the
136 complainant to make such proof thereof as he may be advised. But this defendant avers that, a bridge erected in pursuance of said charter will enable some of the steamers and barges without masts navigating the river to pass under the same, and as these whose masts, smoke pipes and other upward projections are so far above the vessels as to prevent their passing under the bridge, will be able to pass
137 through the draws of said bridge without any material impediment or obstruction.

And this defendant further answering upon information and belief denies that the erection and maintenance of a bridge across said river in the manner intended by the defendant and according to the provisions of the charter, will eventually obstruct the navigation of said river, or materially
138 hinder or prevent the complainant and other citizens of the United States from passing along the same as they have hitherto been accustomed to do, or will greatly interfere with and limit the use and enjoyment, as well as the license granted to the complainant and of like licenses granted under the laws of Congress to various citizens of

the United States, or will hinder or obstruct the subjects of foreign governments and countries in the exercise of their rights of commerce and navigation, or will increase to all or any persons the difficulties, hazard and expense of navi- 139
gating said river by any or all varieties of craft, or damage, interrupt, or diminish the trade, commerce or business of the complainant or of various citizens of the United States, upon said river, to the common nuisance or the irreparable injury of any or either of them, in any material repect whatever.

And this defendant further answering upon information and belief, denies that the bed of the said Hudson river at 140
or within a considerable distance above and below the proposed site of said bridge, is of light unstable sand which is moved by the slightest action of the water, or that by its irregular depth it yearly interrupts and changes the channel of the river at the places aforesaid ; but this defendant admits that between the cities of Albany and Troy, and considerably above the site of the bridge, and also some dis- 141
tance below the said site, the bed of the river is composed of light unstable sand which is easily moved by the action of the water, and from this cause at several places navigation is often interrupted, but that these places are so far removed from the location of the said bridge, that they will not be injuriously affected by the erection of said bridge. This defendant admits that the Hudson river at Albany and 142
its vicinty is subject to annual freshets and by the freshets the channel in some parts of the river is disturbed and varied, but at the city of Albany and for the space of about two miles in front of the city, about midway of which the said bridge is located, the channel of the river is not changed or disturbed in any material degree by reason of any of the causes stated in the said bill of complaint.

And this defendant further answering denies that at the 143
opening of the river in spring-time, immense or dangerous dams of ice are formed at or near said city of Albany, which entirely interrupt the flow of the river in the ordinary channel, or create great and serious alterations in the bed

of the stream; but defendant admits that in part of the river quite distant from the site of said bridge, it has happened on some occasions that ice dams have been formed
144 that have affected the bed of the stream, but these occasions are occasional, and have happened at places removed beyond the influence of any erection at the site of the proposed bridge.

And this defendant further answering admits that for many years the city of Troy has for much of each year employed a steam dredge in clearing and preserving the chan-
145 nel, between said city and Albany, from the changes and obstructions caused by freshets and ice dams. And this defendant upon information and belief avers that the channel of the said river above the village of Bath and between that point and Troy is very narrow, devious and uncertain; the bed of the stream is of light unstable sand, and sand bars are liable to form and do form at every considerable freshets, so that no navigation of the river above Bath would be
146 practicable, but for the constant employment of the dredging machine to remove said sand bars, and by means of the use of which the commerce of Troy is passed.

And this defendant further answering denies that the unavoidable effect of said bridge or its piers and foundations, will be to fill the channel of said river with sand bars, or make the same intricate or fluctuating beyond the possibili-
147 ty of avoidance or reformation by the means indicated in the said act of the legislature of the State of New York, or otherwise so as to present a destructive interruption of the commerce and navigation of said river, and on the contrary thereof, this defendant upon information and belief avers, that the erection of the bridge authorized by the act of the Legislature of the State of New York, will not affect the
148 channel or bed of the river or create sand bars, or essentially interfere with or interrupt the commerce and navigation of said river at the city of Albany or elsewhere.

And this defendant further answering upon information and belief, denies that the government of the United States

was ever influenced by the commercial or national importance of the Hudson river above the village of Bath, or that it possesses an extensive or costly fortification and arsenal, 149
located on the banks of said stream opposite the city of Troy. But this defendant admits that the government of the United States have an arsenal located at West Troy, in the county of Albany, but that the same is not in any way connected with or dependent upon the navigation of the Hudson river. And this defendant upon information and belief further admits that the Congress of the United States 150
have at various times made appropriations for the improvement of the navigation of the Hudson river, the exact amount thereof this defendant is not informed and does not know. And this defendant also admits that about twenty years ago some of the appropriations made by Congress for the improvement of the Hudson river were expended between Albany and Troy, in the partial construction of works designed to improve the navigation at that point, but said 151
works were never completed and were abandoned by the government many years ago, and the works then partially completed, were permitted to go to ruin and are now destroyed, and this defendant denies that several hundred thousand dollars, or any sum whatever has been recently expended by the government of the United States for the improvement of the navigation of the Hudson at or above the city of Albany. 152

And this defendant further answering says, that he is ignorant of the extent of the population of the city of Troy. It admits that said city maintains manufacturing enterprises of various kinds, but denies that they are of unusual extent or importance, and upon information and belief denies that Troy conducts a commerce of great variety, expansion or prosperity. That this defendant does not know the extent of the population of the villages of West Troy and Green 153
Island, or the extent of the capital there employed in manufactures, and the lumber trade, or the commerce incident thereto, and therefore leaves the complainant to make such

proof thereof as he may be advised. This defendant admits that the Erie and Champlain canals unite with the Hudson river at West Troy by means of a side cut, authorized by
154 the Legislature of the State of New York, and that a considerable proportion of the products arriving at tide-water enter the river there, and such products constitute a large proportion of the commerce of Troy and West Troy. But the defendant denies that the proposed bridge crosses the canal basin at Albany below the outlet of the Erie and Champlain canals, but avers that one of said outlets is below the site of the proposed bridge. And this defendant
155 denies, upon information and belief, that the construction and maintenance of said bridge at Albany, will inflict great or irremediable, or any material injury upon each and every or any of the interests connected with Troy, West Troy, Green Island or the canals of the State.

And this defendant further answering denies, upon information and belief, that the full breadth of the river op-
156 posite the whole extent of the said city of Albany, is inadequate to the accommodation of the commerce and navigation conducted at and passing that locality, and while it is probable that the enlargement of the Erie canal, and the increase of facilities for transportation may increase the trade which reaches tide-water at Troy and Albany, and passes upon the Hudson river, yet the size and capacity of
157 the vessels to be employed will be so far increased that the number of passages of vessels up and down the river will probably be less, and the vessels thus employed are of such a character that a bridge will present no impediment to their passing. And this defendant, upon information, and belief, denies that the erection of a bridge across the Hudson
158 at Albany, or the placing of any abutment or pier therein, will inevitably or seriously incommode the trade of the canals of the state, or diminish its extent or increase the expenses or hazards of its prosecution.

And this defendant further answering denies upon information and belief, that the precautionary measures provided

by the said act authorizing said bridge, to diminish the injury to navigation apprehended from the construction of the same, will prove entirely insufficient to secure the rights of the complainant or to protect the navigation of the river from 159
irreparable injury. But on the contrary thereof, this defendant avers upon like information and belief, that the provisions of said act are such, that in the construction of a bridge at Albany, in pursuance thereof, all the existing rights of navigation will be substantially secured and preserved from injury.

And this defendant further answering upon like informa- 160
tion and belief, denies that the extent of the navigation and the nature of the bed of the river, is such as renders it impracticable to construct any form of draw bridge or provide any guards or appliances connected therewith, so as to avoid a material obstruction to the navigation of said river, except in the form of a suspension bridge sufficiently elevated to admit of the passage thereunder of all vessels accustomed to navigate said waters. But on the contrary thereof, this de- 161
fendant upon like information and belief avers, that it is practicable to construct a draw bridge across the Hudson at Albany, in pursuance of the said act of the Legislature, which will not in any material or essential degree interpose any obstruction to commerce or injure the channel or bed of the stream.

And this defendant further answering denies, that there is 162
no public necessity demanding the said bridge or any bridge at the city of Albany, but on the contrary thereof, this defendant avers that the proper accommodation of travel, and of the internal commerce of the State, imperatively demand the construction of a bridge across the Hudson at Albany, by means of which, greater facilities will be afforded for the transit of property, and the great delays, dangers and ex- 163
pense of crossing the Hudson river at Albany, at all seasons of the year, will be avoided.

And this defendant denies, that the exigencies and convenience of general and local commerce and trade, and public

travel, are fully accommodated by existing facilities, or that the erection of said bridge will inflict upon any commercial or other interests, wherever located, incalculable evil or any material injury or inconvenience.

164 And this defendant further answering denies, that it is the intention of this defendant to impede the complainant or any other citizen of the United States, in the free and unobstructed use of said Hudson river for all the substantial and successful purposes of navigation, and this defendant does not intend to intrude upon the rights of the complainant or any other person, or to obstruct the navigation of said

165 stream in any essential degree.

And this defendant further answering denies, that this defendant, disregarding its duty, threatens or has ever threatened to erect and continue said bridge, or any bridge across the Hudson river at Albany, which will produce any of the several injuries mentioned and alleged in said bill of complaint.

166 And this defendant further answering denies, that the said act of the legislature of the State of New York, authorizing the construction of a bridge across the Hudson river at Albany, is unconstitutional and void, but on the contrary thereof, this defendant avers that the same is in all respects valid, and the passage thereof was demanded by the people of the State of New York, as a measure of public necessity,

167 which will tend greatly to the convenience of travel and commerce, and inflict no material injury upon any general or local interest now existing, and comes in conflict with no rights which are secured by or under the protection of any law of the State of New York, or the laws of Congress, or the constitution of the United States of America.

And this defendant further answering avers, that it is

168 within the power of the legislature of the State of New York, to authorize the construction of a bridge across the Hudson, at Albany, for the accommodation of its land commerce and the convenience of its citizens, and that the complainant, or any other person, has no such right in the wa-

ters of the Hudson, as entitles him or them to exclude all other citizens of the state or nation, from crossing over the same by means of a bridge of proper construction, and with 169
convenient draws, for the passage of vessels, which shall present no material impediment to the operations of commerce and navigation,

And this defendant denies that the complainant has any such interest therein, as entitles him to maintain his said bill of complaint, or to the relief in said bill demanded or prayed for, or any other relief whatever.

And this defendant denies all combination and confederacy, 170
and all intention to violate any laws of the State of New York, or of the Congress of the United States, and all intention to oppose or injure the complainant in any of his legal or equitable rights, or to invade the same. And without that, that any other matter or thing in the bill of complaint contained and not herein and hereby well and sufficiently answered unto, confessed or avoided, traversed or denied, is true to the best of the knowledge or belief of this defend- 171
ant.

And this defendant humbly prays to be hence dismissed with its reasonable costs and charges in this behalf, most wrongfully sustained.

GILBERT L. WILSON,
Secretary and Treasurer
of the Hudson River Bridge Company at Albany. 172

JOHN H. REYNOLDS, *Solicitor,*
and of Counsel for the Defendant.

United States of America, Northern District of New York,
City and County of Albany, ss :

On the 31st day of December, A. D., 1856, before me, personally appeared Gilbert L. Wilson, to me known, and 173
being by me duly sworn, did depose and say that he is the Secretary and Treasurer of the Hudson River Bridge Company at Albany, the defendant in the above entitled cause ; that he has heard the foregoing evidence read, and knows

the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be
174 upon the information and belief of the defendant, and as to these matters, he believes it to be true.

R. J. HILTON, *United States Commissioner, for Northern District of New York, in second Circuit.*

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175 FREDERICK W. COLEMAN,
agst.
THE HUDSON RIVER BRIDGE COMPANY AT ALBANY

To the Honorable the Judges of the Circuit Court of the United States, for the Northern District of New York:

Your Orator, Frederick W. Coleman, a resident of the town and county of Barnstable, in the State of Massachu-
176 setts, and a citizen of the United States, brings this his bill of complaint against the Hudson River Bridge Company at Albany, a corporation created and established under and by virtue of an act of the Legislature of the State of New York, entitled, "An Act authorizing the construction of a bridge across the Hudson River at Albany," passed April 9th, 1856, a copy of which is hereto annexed marked "A," and which your Orator prays may be re-
177 garded as a part of his complaint.

And thereupon your Orator complains and shows, that he is the part owner and master of a schooner, called the Vintage, of ninety seven $\frac{72}{95}$ tons Custom House measurement. That said schooner, on the tenth day of March, 1856, was duly enrolled and licensed to carry on the coasting trade, at Barnstable aforesaid, which then was and is a
178 port of entry and delivery, duly established under the acts of Congress in that behalf. That said enrollment and license was duly made and granted under an act of Congress, entitled "An Act for enrolling and licensing ships

or vessels to be employed in the coasting trade and for regulating the same."

Your Orator further shows, that under said license, your Orator, as part owner and master, has, since the granting thereof, been regularly employed in carrying on a coasting 179
trade, with said schooner, between said port of Barnstable and the ports of Albany and Troy, in the State of New York, and intermediate places, and between the said ports of Albany and Troy, in said State of New York, and the port of Boston and other ports and places in various of the States of the United States. And that your Orator, as 180
such part owner and master, under the said license, and one of like character previously issued, has been for more than two years last past, engaged in said coasting trade with said vessel, between the ports aforesaid, and in said business, and under said authority, has been accustomed to navigate the said Hudson river, from its mouth, up to 181
the city of Troy aforesaid; the latter during said time, and still being a port of delivery, under and by virtue of the laws of Congress in that behalf made and provided, and in conveying thereto and therefrom, upon said vessel, cargoes of produce, merchandise, lumber, grain, and other commodities, which were received at and landed upon the 182
wharves and quays, at the said port of Troy. And your Orator intends to prosecute and continue said business in manner as aforesaid.

Your Orator further shows, that the said City of Albany is a Port of Delivery under the Laws aforesaid, and is situated upon the Western shore of said Hudson River, about six miles below said Port of Troy located on the Eastern bank 183
of said River, and that the tide ebbs and flows up to and within the said City of Troy.

Your Orator further shows, upon information and belief, that under the Third Section of said Act of the Legislature of the State of New York, the persons therein named have received subscriptions to the Capital Stock of the Corporation authorized by said Act, and that the whole of the Capital

Stock has been subscribed ; and that under the provisions of
184 said Act, the site of the Bridge thereby authorized, has been established, and a Certificate of the location thereof has been made and filed, under said Act, in the office of the Clerk of the City of Albany, of which the following is a copy :

" WHEREAS, by an Act of the Legislature of the State of New York, entitled 'An Act authorizing the construction of a Bridge across the Hudson River at Albany,' passed April
185 9th, 1856, all persons who should become stockholders, pursuant to the provisions of the said Act, were thereby constituted a body corporate, by the name of " The Hudson River Bridge Company at Albany," for the purpose of erecting and maintaining a Bridge for the purposes of Railroad travel and transportion across the Hudson River, from some proper point on the westerly side or shore of the said River
186 in the City of Albany, to some proper point on the opposite side or shore of the said River in the County of Rensselaer, as might be fixed and determined upon by the Commissioners named in said Act.

"And whereas, the Capital Stock of the Corporation created by the said Act was thereby fixed at the sum of Five Hundred Thousand Dollars, and divided into shares of One Hundred Dollars each, and by the third section of said
187 Act, Moses H. Grinnell, of the City and County of New York, Joseph D. Monell, of the City of Hudson, Columbia County, William Chamberlain, of Dutchess County, Palmer V. Kellogg, of Utica, Oneida County, Hamilton White, of Syracuse, Onondaga County , Delos De Wolf, of Oswego County, Orville V. Brainerd, of Watertown, Jefferson County, Jacob Gould, of Rochester, Monroe County, James S.
188 Wadsworth, of Genesee, Livingston County, Albert H. Tracy, of Buffalo, Erie County, William Keep, of Lockport, Niagara County, Levi Dimmick, of Broome County, Richard Franchot, of Otsego County, and Charles Courter, of Schoharie County, were thereby appointed Commissioners for the purposes of the said act ; and they or a majority of

them were authorized at any time thereafter, on at least ten days previous public notice in the State Paper, to receive subscriptions to the capital stock of the said corporation, at 189
such place and under such regulations, in all respects, as they should prescribe, and at the time of subscription Five Dollars upon each share prescribed for was required to be paid, or such subscription should not be received.

"And whereas, in and by the fourth section of the said act, it was provided, that as soon as the stock to the amount of five hundred thousand dollars should be subscribed for, 190
the said Commissioners or a majority of them, should without delay, give fifteen days' notice, by advertisement in the State Paper, of their intention to locate the said bridge, and after the publication of the said notice, should, without delay, proceed to locate the place where the said bridge shall be constructed, and sign a certificate of such location, and file the same in the office of the Clerk of the County of Al- 191
bany, and after the said location should be agreed upon by the said Commissioners, or a majority of them, they should fix the time and place for holding the first election of Directors of the said Corporation, and should give notice thereof in the State Paper, for at least thirty days previous thereto, and should appoint three of the subscribers to the said stock inspectors of the first election, which should be held 192
by said inspectors, or such of them as might attend, and that said election be conducted as required by law. And it was therein further provided, that all the powers and duties of the said Commissioners might be exercised by a majority of their number.

"And whereas, in pursuance of the authority conferred by the provisions of the said act, the Commissioners named 193
therein, did, on the sixth day of May, one thousand eight hundred and fifty-six, meet together in the Exchange Building in the City of Albany, and thereupon caused public notice to be given, that they the said Commissioners would meet together at the Rotunda of the Exchange Building in the City of Albany, on the twenty-fifth day of June, one thousand

eight hundred and fifty-six, at nine o'clock in the forenoon of that day, to receive subscriptions to the capital stock of
194 the said Corporation, in pursuance of the said act, which notice, signed by the said Commissioners was duly published in the State Paper for the time, and in the manner required in the said act.

"And whereas, on the said twenty-fifth day of June, one thousand eight hundred and fifty-six, at the Rotunda of the said Exchange Building in the city of Albany, in pursuance
195 of the said act, and of said notice, the said Commissioners again met, and thereupon proceeded to open the Books and receive subscriptions to the Capital Stock of the said Corporation, which Books of Subscription were opened at nine o'clock in the forenoon, and remained opened during the business hours of that day, as required by said Act, and during which time the said Commissioners received subscriptions to the said Stock to the full amount of Five Hundred
196 Thousand Dollars, being all the subscriptions made to said Capital Stock, and received a payment in cash of Five Dollars upon each and every share of the Stock so subscribed for.

"And whereas, the full amount of said Capital Stock of said Corporation having been subscribed for in pursuance of the provisions of said Act, the said Commissioners did, on
197 the day aforesaid, cause notice to be given that they would meet at the Rotunda in the Exchange Building in the City of Albany, on the 22d day of July, 1856, at eleven o'clock in the forenoon of that day, for the purpose of locating said Bridge, and would then and there proceed to locate the place where such Bridge should be constructed, which notice, signed by the said Commissioners, was published daily in the State Paper as required by said Act.

198 "And whereas, the said Commissioners did, in pursuance of the said Act, and of said notice, meet together at the Rotunda of the said Exchange Building in the City of Albany, on the said Twenty-Second day of July, 1856, for the purpose of locating the said bridge, and having then and there

proceeded to consider the question of such location, but without finally determining the same, and for the purpose of procuring further information, adjourned the said meeting to the twentieth day of August, 1856, at eleven o'clock 199
in the forenoon, at the Rotunda in said Exchange Building in the City of Albany, and notice of such adjourned meeting was, on the same day, published in the State paper, and daily, until the said twentieth day of August, 1856.

"And whereas, on the day, and at the place last mentioned, the said Commissioners again met, and having further considered the question of the location of said bridge, but without 200
concluding the same, continued their meeting at the same place, until and including the twenty-first day of August, 1856.

"At which day and place last mentioned, to wit, the twenty-first day of August, one thousand eight hundred and fifty-six, at the Exchange in the City of Albany, the undersigned Commissioners, again met together, and having made and 201
caused to be made all necessary surveys and examinations in the premises, and having been furnished with maps and profiles of the lines and elevations for the proposed location of said bridge, and heard the representations of various parties in regard thereto, and having duly considered the same, did proceed to locate the place where said bridge shall be 202
constructed, and by virtue of the power of authority conferred upon them by the said act, do hereby determine and locate the place where the said bridge shall be constructed, as follows, to wit:

"The westerly end of the said bridge shall be located at the foot of Exchange street, in the city of Albany, on the westerly side or shore of the Hudson river, and the easterly end of said bridge shall be located on the easterly 203
side or shore of said river, at a point on the easterly branch of said river, commonly called Van Ransselaer Creek, two hundred and fifty-five feet southerly from the centre of Partition street, in Greenbush, in the county of Rensselaer,

the said bridge to cross the main channel of the river by a straight line nearly at right angles thereto, and connected
204 with the said points on the easterly and westerly side of the river by suitable curved lines to accomodate and render convenient the approach to said bridge; and we the said commissioners, in pursuance of the provisions of the said act, have made and signed this certificate of such location, and direct the same to be filed in the office of the
205 clerk of Rensselaer county as required by said act.

"And in pursuance of the provisions of said act, we do hereby fix and appoint the twenty-fourth day of September, one thousand eight hundred and fifty-six, at twelve o'clock at noon of that day, as the time, and the Rotunda of the Exchange building in the city of Albany as the place, for holding the first election of directors of the said
206 corporation; and do direct that the polls at said election be kept open from 12 o'clock at noon until 2 o'clock in the afternoon of the said day, and that notice of such election be published pursuant to the provisions of the fourth section of said act.

"And we do hereby, in pursuance of said act, appoint Gerritt Y. Lansing, of Albany, Palmer V. Kellogg, of
207 Utica, Alexander H. Schultz, of Fishkill, three of the subscribers to the capital stock of the said corporation, as inspectors of said election, and direct that they or such of them as may attend, hold the said election, and conduct the same as required by law.

"In witness whereof, we the undersigned, commissioners, have hereunto subscribed our names this twenty-first day of August, one thousand eight hundred and fifty-six.

208 JACOB GOULD, DELOS DE WOLF,
PALMER V. KELLOGG, LEVI DIMMICK,
JOS. D. MONELL, CHARLES COURTER,
ALBERT H. TRACY, O. V. BRAINERD,
WM. CHAMBERLAIN, RICHARD FRANCHOT,
WILLIAM KEEP."

STATE OF NEW YORK, } ss.
City of Albany. }

On this twenty-first day of August, in the year one thousand eight hundred and fifty-six, before me the subscriber 209
personally came Jacob Gould, Palmer V. Kellogg, Joseph D. Monell, Albert H. Tracy, William Chamberlain, William Keep, Delos De Wolf, Levi Dimmick, Charles Courter, Orville V. Brainard and Richard Franchot, to me known to be the individuals described in, and who executed the foregoing Certificate, and they severally, each for himself, acknowledged that they executed the same. 210

Filed August 21st, 1856.

J. STERNBERGH,
Commissioner of Deeds.

And your Orator further shows, that the first Directors of the said Corporation have been elected, and the said Corporation has become organized under said Act, and is preparing to construct and maintain said bridge at or near 211
the place aforesaid, and threatens and intends so to do.

Your Orator further shows, that the defendant is making preparation and threatens and intends to erect said bridge across said river upon massive stone piers, several of which, as your Orator is informed and believes, of about twenty feet in breadth, are designed to be placed in the main channel of said river, and in the direct, ordinary, and 212
necessary course of commerce and navigation thereupon; and that at least two of said piers, upon which the draw or draws required by said Act shall operate, must necessarily be of much larger dimensions than aforesaid, and that the defandants do not intend to elevate said bridge materially, or any more than twenty feet above common tide water. But your Orator is ignorant of the precise plan or mode the defendants intend to adopt and use in the construction 213
of said bridge, and your orator prays that the said defendants may fully and minutely disclose and set forth the same in their answer hereto. But your Orator charges

that the said defendants threaten and intend to erect said bridge at an elevation of not more than twenty feet above
214 common tide water, and not sufficiently elevated above said stream as to admit the passage thereunder of the steamers, masted vessels, barges and tows daily accustomed to pass the said location.

Your Orator charges and shows, that the erection and maintenance of said bridge, across said river, in the manner intended and threatened by the said defendants, will
215 essentially obstruct the navigation of said river, and materially hinder and prevent your Orator and other citizens of the United States from passing along the same as they have hitherto been accustomed to do, and will greatly interfere with and limit the use and enjoyment, as well of the license so as aforesaid granted to your Orator, as of like licenses granted under the laws of Congress to various
216 of the citizens of the United States, and will hinder and obstruct the subjects of foreign government and countries in the exercise of their rights of commerce and navigation, and will increase to all persons the difficulties, hazard and expense of navigating said river, by any and all varieties of craft, and derange, interrupt, and diminish the trade, commerce and business of your Orator, and of the citizens
217 of the United States, upon said river, to the common nuisance, and their irreparable injury.

And your Orator further shows, upon information and belief, that the bed of the said Hudson River at, and above and below the proposed site of said bridge, and between the cities of Troy and Albany, is of light, unstable sand, which is moved by the slightest action of the water, and
218 by its irregular deposits, yearly interrupts and changes the channel of said river at the places aforesaid. That the said river, at the city of Albany and its vicinity, is subject to heavy annual freshets, which uniformly disturb and vary its channel. That at the opening of the river in spring time, immense and dangerous dams of ice are formed at or

near said city of Albany, which entirely interrupt the flow of the river in the ordinary channel, and create great and serious alterations in the bed of the stream. That for 219
many years the city of Troy has, for much of each year, employed a steam Dredge in clearing and preserving the channel between said city and Albany, from the changes and obstructions caused as aforesaid; and that the unavoidable effect of said bridge, and its piers and foundations, will be to fill the channel of said river with sand-bars, and make the same intricate and fluctuating, beyond the possi- 220
bility of avoidance or reformation by the means indicated in said Act of the Legislature of the State of New York, or otherwise, so as to prevent a destructive interruption of the commerce and navigation of said river.

Your Orator further shows, that influenced by the commercial and national importance of said river, and possessing an extensive and costly fortification and Arsenal, located on the banks of said stream, opposite the city of 221
Troy, the Government of the United States has, from time to time, made large appropriations for the improvement of the navigation of said river, and several hundred thousand dollars have recently been expended thereunder, for that purpose, between the cities of Troy and Albany, and above the proposed site for said bridge.

Your Orator further shows, upon information and belief, that the city of Troy contains a population of near forty 222
thousand inhabitants; that it maintains manufacturing enterprises of unusual extent and importance, and conducts a commerce of great variety, expansion and prosperity. That the villages of West Troy and Green Island, immediately opposite, contain a population of about seven thousand, employing a large capital in manufactories and the lumber trade, and the commerce incident thereto. That the Erie and Champlain canals unite with said river at 223
West Troy aforesaid, and that a large proportion of the products arriving at tide-water by said canals, are there

locked into said river, and that the proposed location of said bridge, crosses the Canal Basin at Albany below the outlet of said canals. And your Orator says that the con-
224 struction and maintenance of said bridge will inflict great and irremediable injury upon each and every of the interests aforesaid.

Your Orator further shows, upon information and belief, that the full breadth of said river, opposite the whole extent of the said city of Albany, is inadequate to the accommodation of the commerce and navigation conducted at and pass-
225 ing that locality. That the contemplated enlargement of the Erie canal, the rapid increase in the population of the Western States, and in the facilities for transportation, must inevitably and speedily magnify the vast trade which touches tide-water at Troy and Albany, and passes upon said river to tho seaboard. And your Orator charges that the erection of a bridge across said river, at the city of Albany, or the placing of any abutment or pier therein,
226 will inevitably and seriously incommode said trade, diminish its extent, and increase the expenses and hazards of its prosecution.

And your Orator charges, upon information and belief, that the precautionary measures provided by the said Act authorising said bridge, professedly to divert or diminish the injury to navigation apprehended from the construc-
227 tion of the same, will prove entirely inefficient to secure the rights of your Orator aforesaid, or to protect such navigation from irreparable injury. That from the extent of such navigation, and the nature of said river, it is impracticable to construct any form of draw bridge, or provide any guards or appliances connected therewith, so as to avoid a
228 material obstruction to the navigation of said river, except in the form of a Suspension Bridge, sufficiently elevated to admit the passage thereunder of all vessels accustomed to navigate said waters.

And your Orator further says, that there is no public necessity demanding the said bridge, or any bridge at the

city of Albany. That the exigences and convenience of general and local commerce and trade, and public travel, are fully accommodated by existing facilities, and that if otherwise, it is entirely unnecessary to inflict upon the 229
aforesaid commercial and property interests, the incalculable evil of said bridge.

And your Orator well hoped that he and the citizens of the United States navigating said river, would have been permitted to remain in the free and unobstructed use of the same, and that the defendants would have refrained from intruding upon the rights of your Orator and said citizens, 230
and from obstructing the navigation of said stream.

But the said defendants disregarding their duty, threaten to erect said bridge and to continue the same, or some bridge across said river, at the said city of Albany, similar to that above mentioned, and which will produce the several injuries hereinbefore described.

In consideration whereof, and inasmuch as your Orator 231
can obtain no adequate remedy in the courts of common law, and to the end that the defendants may answer the premises, and that the said Act of the Legislature of the State of New York authorising the construction of a bridge across the said Hudson River, may be decreed by this Honorable Court unconstitutional and void. And that the said defendants may be restrained, by the order and decree 232
of this court, from erecting the said proposed bridge, and from erecting any bridge over the tidewater of said river, or below the said city of Troy, by which any permanent structure shall be placed in said river, or be placed over the same, unless elevated above the ordinary height, at all stages of the water, of the masts and chimneys of the various craft navigating the same. And that your Orator 233
may be protected in the enjoyment of the free navigation of said river, and may have such other and further relief as to your Honors shall seem meet, and agreeable to equity.

May it please your Honors to grant to your Orator a

writ of injunction issuing out of this court, directed to the said The Hudson River Bridge Company at Albany, restraining and preventing them, their servants and agents,
234 from erecting or proceeding to erect any bridge over or across the Hudson River at or opposite the city of Albany, and from placing thereat any abutment, pier or permanent structure, or any erection over the said river, unless elevated above the height, at all stages of the water, of the tallest masts and steam chimneys accustomed to navigate said river, and from placing in, upon or over said river at
235 or opposite said city of Albany, any impediment to the free and natural flow of the waters thereof, or to the uninterrupted navigation of the same; and also the writ of Subpœna to be directed to the said defendants, commanding them at a certain day and under a certain penalty therein to be limited, to appear before this Honorable Court, and then and there full, true and perfect answer make to all and singular the premises, and further to stand
236 to, perform and abide such further order and decree herein, as to your Honors shall seem meet. And your Orator will ever pray, &c.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, } ss.

On this second day of October, one thousand eight hun-
237 dred and fifty-six, Frederick W. Coleman, the complainant in the foregoing bill of complaint, came before me, and having signed the same, and being by me duly sworn, did depose and say, that he had read the said bill, and knew the contents thereof, and that the same was true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believed it to be true.

238 AUSTIN J. CUSHMAN,

Commissioner of the Circuit Court of the United States, in and for the District aforesaid, to take acknowledgements of bail and affidavits, and to take depositions.

FREDERICK W. COLEMAN.
agst.
THE HUDSON RIVER BRIDGE COMPANY AT ALBANY. } ***In Equity.***

To the Honorable the Judges of the Circuit Court of the United States, for the Northern District of New York: 239

The answer of the Hudson River Bridge Company at Albany, the defendant to the bill of complaint, of Frederick W. Coleman, complainant.

This defendant reserving to itself all benefits of exception to the manifold errors and insufficiencies in the said bill of complaint contained for answer thereunto, or unto so much 240 and such parts thereof, as the defendant is advised, it is material or necessary for it to make answer thereto, answering, says that the complainant is unknown to this defendant, and it has no knowledge or information whether the said complainant is a resident of the town and county of Barnstable in the State of Massachusetts, or whether he is a citizen of the United States, save by the said bill, and can neither admit nor deny the same, and therefore leaves the 241 said complainant to make such proof thereof as he may be advised. This defendant admits that it is a corporation created and established under and by virtue of an act of the Legislature of the State of New York, entitled "An act authorizing the construction of a bridge across the Hudsan river at Albany," passed April 9th, 1856, a printed copy whereof is annexed to the said bill of complaint. 242

And this defendant further answering says, that whether the complainant in said bill named, is the part owner and master of a schooner called the "Vintage" of ninety-seven $\frac{7}{95}$ tons, custom house measurement, or whether said schooner was on the 10th day of March, 1856, duly enrolled and licensed to carry on the coasting trade at Barnstable aforesaid which then was a port of entry and delivery, duly established 243 under acts of Congress in that behalf, or whether the said enrolment and license was duly made and granted under the

act of Congress referred to in said bill of complaint this defendant does not know and is not informed, save by the complainants bill, and it can neither admit nor deny the same, and therefore leaves the complainant to make such proof
244 thereof as he may be advised.

And this defendant further answering says, that whether under said license the complainant as part owner and master has since the granting thereof been regularly employed in carrying on the coasting trade with said schooner between the port of Barnstable, and the ports of Albany and Troy, in the State of New York, and intermediate places, and be-
245 tween the said ports of Albany and Troy in the State of New York, and the port of Boston, and other ports and places in various of the States of the United States, or whether the complainant, as such part owner and master under the said license, and one of like character previously issued, has been for more than two years last past engaged in said coasting trade with said vessel between the ports aforesaid and in
246 said business and under said authority, or has been accustomed to navigate the Hudson river, from its mouth up to the city of Troy aforesaid, being a port of delivery, and in conveying thereto and therefrom, upon the said vessel, cargoes of produce, merchandise, lumber, grain and other commodities which were received and landed upon the wharves and quays at said port of Troy, or whether the complainant
247 intends to continue said business, in manner aforesaid, this defendant does not know, and is not informed save by the said bill, and can neither admit nor deny the same, and therefore leaves the complainant to make such proof thereof as he may be advised.

And this defendant further answering admits, that the city of Albany, is a port of delivery under the laws of Congress,
248 and is situated upon the western shore of the Hudson river, about six miles below the said city of Troy, which is located on the eastern bank of said river, and that the tide ebbs and flows up to the city of Troy; but this defendant avers

that the tides at the city of Troy, or above Albany, are quite inconsiderable and do not ordinarily raise the water beyond ten or twelve inches. 249

And this defendant further answering admits, that under the provisions of the act of the legislature of the State of New York, herebefore referred to, the persons named therein have received subscriptions to the capital stock of the corporation, thereby authorized that the whole of said capital stock has been subscribed, and that under the provisions of the said act, the site of the bridge thereby authorized has been established, and a certificate of the 250 location thereof has been made and filed, in pursuance of the provisions of the said act, in the office of the clerk of the county of Albany, and that a substantial copy of said certificate is contained in said bill of complaint.

And this defendant further answering admits, that directors have been duly elected, and that this defendant is duly organized as a corporation under the said act of the legislature of the State of New York; and this defendant admits 251 that it has made some preliminary preparations, in the way of making examinations and obtaining necessary information, but not otherwise, and intends, pursuant to the provisions of the said act of the legislature, and strictly in accordance with the authority therein and thereby granted, to construct and maintain a bridge at the place of its location, as the defendant insists it has the legal right and 252 authority to do.

And this defendant further answering denies, that it is making preparation or threatens or intends to erect said bridge across said river upon massive stone piers, several of which of about twenty feet in breadth, are designed to be placed in the main channel of said river, and in the direct, ordinary and necessary course of commerce and navi- 253 gation thereupon, or that at least two of said piers upon which the draw or draws required by said act shall operate, are to be of much larger dimensions than twenty feet in

breadth, or that this defendant does not intend to elevate said bridge materially or any more than twenty feet above
254 common tide, and in relation thereto this defendant says, that it has not fixed or determined upon any precise place for the construction of said bridge, nor has it determined the size, number or location of piers to be erected upon which said bridge shall rest, or how high it shall be elevated above common tide, and hence this defendant cannot set forth the precise plan of the bridge to be erected as afore-
255 said, but this defendant does not intend to erect any bridge, except strictly pursuant to the provisions of its charter in every respect, and which shall not materially impede or obstruct the navigation of the river.

And this defendant further answering, denies that it has threatened or intended or does threaten or intend to erect said bridge at an elevation not more than twenty feet above common tide water, or one that is not of the elevation re-
256 quired by its charter, and whether steamers, masted vessels, barges and tows daily accustomed to pass the location of said bridge, will all be able to pass under said bridge when so erected in pursuance of said charter, must depend upon the elevation of said bridge as finally determined upon by this defendant, and upon the character of the steamers, masted vessels, barges and tows which may have occasion to pass the same; and this defendant can neither admit
257 nor deny the allegation in said bill in that behalf made, and leaves the complainant to make such proof thereof as he may be advised. But this defendant avers that, a bridge erected in pursuance of said charter will enable some of the steamers and barges without masts navigating the river to pass under the same, and as to these whose masts, smoke pipes and other upward projections are so far above
258 the vessels as to prevent their passing under the bridge, will be able to pass through the draws of said bridge without any material impediment or obstruction.

And this defendant further answering upon information and belief denies that the erection and maintenance of a

bridge across said river in the manner intended by the defendant and according to the provisions of the charter, will 259
eventually obstruct the navigation of said river or materially hinder or prevent the complainant and other citizens of the United States from passing along the same as they have hitherto been accustomed to do, or will greatly interfere with and limit the use and enjoyment, as well as the license granted to the complainant, and of like licenses granted under the laws of Congress to various citizens of the United States, or will hinder or obstruct the 260
subjects of foreign governments and countries in the exercise of their rights of commerce and navigation or will increase to all or any persons the difficulties, hazard and expense of navigating said river by any or all varieties of craft, or damage, interrupt or diminish the trade, commerce or business of the complainant or of various citizens of the United States, upon said river, to the common nuisance or 261
the irreparable injury of any or either of them, in any material respect whatever.

And this defendant further answering upon information and belief denies that the bed of the said Hudson river at or within a considerable distance above and below the proposed site of said bridge, is of light unstable sand which is moved by the slightest action of the water or that by its 262
irregular depth it yearly interrupts and changes the channel of the river at the places aforesaid; but this defendant admits that between the cities of Albany and Troy and considerably above the site of the bridge and also some distance below the said site, the bed of the river is composed of light unstable sand which is easily moved by the action of the water, and from this cause at several places 263
navigation is often interrupted, but that these places are so far removed from the location of the said bridge, that they will not be injuriously affected by the erection of said bridge. This defendant admits that the Hudson river at Albany and its vicinity is subject to annual freshets and by

the freshets the channel in some parts of the river is dis-
264 turbed and varied, but at the city of Albany and for the space of about two miles in front of the city, about midway of which the said bridge is located, the channel of the river is not changed or disturbed in any material degree by reason of any of the causes stated in the said bill of complaint.

And this defendant further answering denies that at the opening of the river in spring-time, immense or dangerous
265 dams of ice are formed at or near the city of Albany, which entirely interrupt the flow of the river in the ordinary channel, or create great and serious alterations in the bed of the stream; but defendant admits that in parts of the river quite distant from the site of said bridge, it has happened on some occasions that ice dams have been formed that have affected the bed of the stream, but these oc-
266 casions are occasional, and have happened at places removed beyond the influence of any erection at the site of the proposed bridge.

And this defendant further answering admits that for many years the city of Troy has for much of each year employed a steam dredge in clearing and preserving the channel, between said city and Albany, from the changes and obstructions caused by freshets and ice dams. And this
267 defendant upon information and belief avers that the channel of the said river above the village of Bath and between that point and Troy is very narrow, devious and uncertain; the bed of the stream is of light unstable sand, and sand bars are liable to form and do form at every considerable freshet, so that no navigation of the river above Bath
268 would be practicable, but for the constant employment of the dredging machine to remove said sand bars, and by means of the use of which the commerce of Troy is passed.

And this defendant further answering denies that the unavoidable effect of said bridge or its piers and foundations, will be to fill the channel of said river with sand bars, or

make the same intricate or fluctuating beyond the possibility of avoidance or reformation by the means indicated in the said act of the legislature of the state of New York, or otherwise so as to present a destructive interruption of the commerce and navigation of said river, and on the 269
contrary thereof, this defendant upon information and belief avers, that the erection of the bridge authorised by the act of the legislature of the state of New York, will not affect the channel or bed of the river or create sand bars, or essentially interfere with or interrupt the commerce and navigation of said river at the city of Albany or elsewhere. 270

And this defendant further answering upon information and belief, denies that the government of the United States was ever influenced by the commercial or national importance of the Hudson river above the village of Bath, or that is possesses an extensive or costly fortification and arsenal, located on the banks of said stream opposite the city of 271
Troy. But this defendant admits that the government of the United States have an arsenal located at West Troy, in the county of Albany, but that the same is not in any way connected with or dependent upon the navigation of the Hudson river. And this defendant upon information and belief further admits that the congress of the United States have at various times made appropriations for the improve- 272
ment of the navigation of the Hudson river, the exact amount thereof this defendant is not informed and does not know. And this defendant also admits that about twenty years ago some of the appropriations made by congress for the improvement of the Hudson river were expended between Albany and Troy, in the partial construc- 773
tion of works designed to improve the navigation at that point, but said works were never completed and were abandoned by the government many years ago, and the works then partially completed, were permitted to go to ruin and are now destroyed, and this defendant denies that several hundred thousand dollars, or any sum whatever has been recently expended by the government of the

United States for the improvement of the navigation of the Hudson at or above the city of Albany.

274 And this defendant further answering says, that he is ignorant of the extent of the population of the city of Troy. It admits that said city maintains manufacturing enterprises of various kinds, but denies that they are of unusual extent or importance, and upon information and belief denies that Troy conducts a commerce of great variety, expansion or prosperity. That this defendant does
275 not know the extent of the population of the villages of West Troy and Green Island, or the extent of the capital there employed in manufactures and the lumber trade or the commerce incident thereto, and therefore leaves the complainant to make such proof thereof as he may be advised. This defendant admits that the Erie and Champlain canals unite with the Hudson river at West Troy by means of a side cut, authorized by the Legislature of the
276 State of New York, and that a considerable proportion of the products arriving at tide-water enter the river there, and that such products constitute a large proportion of the commerce of Troy and West Troy. But the defendant denies that the proposed bridge crosses the canal basin at Albany below the outlet of the Erie and Champlain canals, but avers that one of said outlets is below the site of the
277 proposed bridge. And this defendant denies, upon information and belief, that the construction and maintenance of said bridge at Albany will inflict great or irremediable, or any material injury upon each and every or any of the interests connected with Troy, West Troy, Green Island or the canals of the State.

And this defendant further answering denies, upon information and belief, that the full breadth of the river oppo-
278 site the whole extent of the said city of Albany is inadequate to the accommodation of the commerce and navigation conducted at and passing that locality, and while it is probable that the enlargement of the Erie canal, and the

increase of facilities for transportation may increase the trade which reaches tide-water at Troy and Albany, and passes upon the Hudson river, yet the size and capacity of the vessels to be employed will be so far increased that the 279
number of passages of vessels up and down the river will probably be less, and the vessels thus employed are of such a character that a bridge will present no impediment to their passing. And this defendant, upon information and belief, denies that the erection of a bridge across the Hudson at Albany, or the placing of an abutment or pier therein will inevitably or seriously incommode the trade of the 280
canals of the State, or diminish its extent or increase the expenses or hazards of its prosecution.

And this defendant further answering denies upon information and belief, that the precautionary measures provided by the said act authorizing said bridge, to diminish the injury to navigation apprehended from the construction of the same, will prove entirely insufficient to secure the rights 281
of the complainant or to protect the navigation of the river from irreparable injury. But on the contrary thereof, this defendant avers upon like information and belief, that the provisions of said act are such, that in the construction of a bridge at Albany, in pursuance thereof, all the existing rights of navigation will be substantially secured and preserved from injury. 282

And this defendant further answering upon like information and belief, denies that the extent of the navigation and the nature of the bed of the river, is such as renders it impracticable to construct any form of draw bridge or provide any guards or appliances connected therewith so as to avoid a material obstruction to the navigation of said river, except in the form of a suspension bridge sufficiently elevated to admit of the passage thereunder of all vessels 283
accustomed to navigate said waters. But on the contrary thereof, this defendant upon like information and belief avers, that it is practicable to construct a draw bridge

across the Hudson at Albany, in pursuance of the said act of the Legislature, which will not in any material or es-
284 sential degree interpose any obstruction to commerce or injure the channel or bed of the stream.

And this defendant further answering denies, that there is no public necessity demanding the said bridge or any bridge at the city of Albany, but on the contrary thereof, this defendant avers that the proper accommodation of
285 travel, and of the internal commerce of the State, imperatively demand the construction of a bridge across the Hudson at Albany, by means of which, greater facilities will be afforded for the transit of property, and the great delays, dangers and expense of crossing the Hudson river at Albany, at all seasons of the year, will be avoided

And this defendant denies, that the exigencies and con-
286 venience of general and local commerce and trade, and public travel are fully accommodated by existing facilities, or that the erection of said bridge will inflict upon any commercial or other interests wherever located, incalculable evil, or any material injury or inconvenience.

And this defendant further answering denies, that it is the intention of this defendant, to impede the complainant or
287 any other citizen of the United States, in the free and unobstructed use of said Hudson river, for all the substantial and successful purposes of navigation, and this defendant does not intend to intrude upon the rights of the complainant or any other person, or to obstruct the navigation of said stream in any essential degree.

And this defendant further answering denies, that this defendant disregarding its duty, threatens or has ever threa-
288 tened to erect and continue said bridge or any bridge across the Hudson river at Albany, which will produce any of the several injuries mentioned and alleged in said bill of complaint.

And this defendant further answering denies, that the said act of the legislature of the State of New York, authorizing the construction of a bridge across the Hudson river

at Albany, is unconstitutional and void, but on the contrary thereof, this defendant avers that the same is in all respects valid, and the passage thereof was demanded by the people of the State of New York, as a measure of public necessity, 289
which will tend greatly to the convenience of travel and commerce, and inflict no material injury upon any general or local interest now existing, and comes in conflict with no rights which are secured by or under the protection of any law of the State of New York, or the laws of Congress, or the constitution of the United States of America.

And this defendant further answering avers, that it is 290
within the power of the legislature of the State of New York, to authorize the construction of a bridge across the Hudson, at Albany, for the accommodation of its land commerce and the convenience of its citizens, and that the complainant, or any other person, has no such right in the waters of the Hudson, as entitles him or them to exclude all other citizens of the state or nation, from crossing over the same by means of a bridge of proper construction, and with 291
convenient draws, for the passage of vessels, which shall present no material impediment to the operations of commerce and navigation,

And this defendant denies that the complainant has any such interest therein, as entitles him to maintain his said bill of complaint, or to the relief in said bill demanded or prayed for, or any other relief whatever. 292

And this defendant denies all combination and confederacy, and all intention to violate any laws of the State of New York, or of the Congress of the United States, and all intention to oppose or injure the complainant in any of his legal or equitable rights, or to invade the same. And without that, that any other matter or thing in the bill of complaint contained and not herein and hereby well and sufficiently answered unto, confessed or avoided, traversed or denied, 293
is true to the best of the knowledge or belief of this defendant.

And this defendant humbly prays to be hence dismissed with its reasonable costs and charges in this behalf, most
294 wrongfully sustained.

GILBERT L. WILSON,
Secretary and Treasurer
of the Hudson River Bridge Company at Albany.

JOHN H. REYNOLDS, *Solicitor,*
and of Counsel for the Defendant.

United States of America, Northern District of New York,
295 *City and County of Albany, ss :*

On the 31st day of December, A. D., 1856, before me, personally appeared Gilbert L. Wilson, to me known, and being by me duly sworn, did depose and say that he is the Secretary and Treasurer of the Hudson River Bridge Company at Albany, the defendant in the above entitled cause ; that he has heard the foregoing evidence read, and knows
296 the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be upon the information and belief of the defendant, and as to these matters, he believes it to be true.

R. J. HILTON, *United States Commissioner,*
for Northern District of New York, in second Circuit.

At a Special Term of the Circuit Court of the United States of America, for the Northern District of New York, in the Second 297
Circuit, held at the Clerk's Office, in the city of Utica, on Saturday, the 25th day of July, in the year of our Lord, one thousand eight hundred and fifty-seven.

Present, The Honorable SAMUEL NELSON, *Justice.*

298

ROBERT D. SILLIMAN,
agst.
THE HUDSON RIVER BRIDGE COMPANY AT ALBANY

In Equity.

COLEMAN,
vs.
THE SAME.

299

A motion having heretofore been made by the plaintiff for a preliminary Injunction, pursuant to the prayer of the Bill of Complaint on file, and after reading and filing affidavits and papers in support of said motion and also in opposition thereto, and after hearing counsel for the respective parties, and due deliberation being had thereon: It is now, here, on motion of Mr. W. A. Beach, Solicitor for the plaintiff, ordered that an Injunction do issue, pursuant to the 300
prayer of the said Bill.

A copy—as witness my hand and official seal,
[L. S.] July 28, 1857.

AUGUSTUS A. BOYCE, *Clerk.*

UNITED STATES CIRCUIT COURT.

ROBERT D. SILLIMAN
vs.
301 THE HUDSON RIVER BRIDGE COMPANY.

NELSON, C. J—This is a motion on behalf of the complainant, who is engaged in the navigation of the Hudson River with vessels enrolled and licensed under acts of Congress, in the coasting trade, for an injunction against the defendant, to enjoin them against the erection of a bridge at Albany, which it is charged will seriously obstruct the
302 free navigation of said river.

The defendants, in answer to the motion, set up an act of the Legislature of New York, passed April 9, 1856, conferring upon them authority to erect a bridge over the Hudson River at the place mentioned, and claim the right to erect the same in pursuance thereof.

The eighth section of that act provides for the erection
303 of a bridge, which shall be constructed at an elevation at least twenty feet above common tide-water, so as to allow under it the free passage of canal boats and barges without masts, and with a draw therein of sufficient width to admit the free passage of the largest vessels navigating the said river, and at least two hundred feet in width, or of two draws of at least one hundred and fifty feet each, which draws shall not be obstructed by piers or otherwise,
304 and in such a manner as to cause no substantial impediment or obstruction to the free navigation of said river; and the said corporation hereby created, shall, at all times, during the season of navigation, cause the said draw to be opened, and kept open, except for the passage of railroad trains of cars, and shut whenever the same may be neces-
305 sary, and boats or vessels wishing to pass such draw, shall, at all times, have a preference over railroad trains of cars or engines; and such draw shall be promptly opened to any such boat or vessel on signal, if given before any railroad train or engine shall have appeared and given signal

of their intention to pass. There are other clauses in the act relating to the towing of sailing vessels through the draw; for lights at night on the bridge, and for the removal of sand bars or other obstructions, caused by the erec- 306
tion of the bridge or the piers of the same.

There are some provisions of the charter which would seem to indicate an intent to limit the use of the bridge to the transportation of trains of railroad cars across the river, but, upon a careful perusal of the whole of the act, we are inclined to think the former conferred upon the defendants, is more extensive. 307

The first section constituting the stockholders a corporation, declares the object to be erecting and maintaining a bridge "for the purpose of railroad trains and transportation, a cross the Hudson River," &c., and the eighth section contains a clause, that the company shall "cause the said draw to be opened, and kept open, except for the passage of railroad trains of cars, and that whatever the same may 308
be necessary," &c.

But, the twelfth section provides, that "after the bridge shall have been completed, *such tolls, and charges may be collected for crossing the same on foot, and with waggons, cars, or carriages of any kind, and with horses, or other animals, or otherwise, as the directors may form time to time establish, &c,*" and any person crossing or attempting to cross said bridge 309
without paying the proper toll, shall be subject to a penalty of ten dollars in addition to three times the amount of toll such person or persons ought to have paid."

This section must be read in connection with the two clauses already referred to and is significant of the intent and meaning of them by the legislature, and very clearly indicate that the purpose and object of the bridge were not 310
simply the transportation of railroad trains, but, in addition, the accommodation of the public in general, in travel, and business, by the use of it at a common highway.

We shall not stop to reason out this view by collating the various provisions of the charter bearing upon it, but, shall

content myself in stating it. We think it can be established beyond any reasonable doubt.

The grave question in the case, therefore, is, whether or
311 not, a bridge constructed according to directions in the charter for the convenience over the same of trains of railroad cars, and for the accommodation of the traveling and business public, in general, will constitute an obstruction of the free navigation of the river within the meaning of the constitution, and acts of Congress, securing to the complainant, other citizens a right to the enjoyment of the same.

312 The affirmative is maintained by the complainant, and denied by the defendants.

The proofs before us, bearing upon the question, are very volumnious and conflicting, and if called upon to determine the case finally upon them would occasion considerable hesitation, and embarrassment.

The question, however, as presented here, on this motion, is of less weight and urgency, as it is limited to the simple
313 enquiry whether the case has been presented which calls upon the court to interfere and arrest the erection of the bridge until an opportunity is afforded for a more full examination of witnesses, and mature consideration of the alleged obstruction.

A preliminary enquiry in this and like cases should especially be made by the party complaining, and the work con-
314 templated promptly enjoined if there should be any reasonable grounds for believing that the bridge might finally be held an obstruction, and hence subject to be abated, as the expense and loss of the defendants involved might otherwise be heavy ruinous. A consideration that pressed most most strongly upon the court in passing upon the obstruction in the case of the Wheeling bridge, was the heavy expenditure
315 of the defendants in the erection, and regret was expressed that the Judge, before whom the application for the injunction was first made, had not enjoined any further proceedings till the great question involved had been finally disposed of. No court can avoid feeling the weight of this consideration,

or being considerably influenced by it in deliberating upon the application for an injunction. A refusal is an encouragement to go on, and may greatly embarrass the determination in the final hearing. The case is very different from 316
the ordinary one, where the only loss or suffering arising from the refusal is that which accrues to the complainant in such cases, if the right is regarded as doubtful, the injunction is nominally withheld till the right is established by a trial at law, or on the final hearing.

But, in the present and similar cases, the injury to the 317
complainant is not only involved, but, also, encouragement to the defendant to go on, leading to heavy expenditures, which the court may feel bound, at the final hearing, to disregard and render useless.

These considerations have led the Court of Chancery in England, especially, where the title of the complainant is clear but the obstructions denied, and the case to be sent to
a court of law for a trial, to accompany the order with an 318
injunction until the hearing after the coming in of the result of the trial at law.

Now, in this case, there is no question as to the title, or, in other words, the legal right of the complainant to a free and unobstructed navigation of the Hudson river—this has been secured by the Constitution and acts of Congress 319
under which the right is claimed, and which, as I understand it, was not denied on the argument.

The defence was placed on the ground, that a bridge constructed as provided for in the charter, would not substantially obstruct or impede this right ; but, on the contrary, was consistent with its full enjoyment.

It is upon this question that I entertain doubts at the 320
present stage of the proceedings and proofs in the case, and am not prepared to agree with the defendants. I cannot say, as at present advised, that the erection of the bridge in the mode prescribed, and in connection with the powers conferred in the use of it, will not be a serious or material obstruction to the free navigation of the river.

What the truth may be upon a more full and through development of the facts, of course, it is now impossible to determine. We speak only of the case as now presented.
321 Many of the facts upon which the question of obstruction must ultimately turn have not been sufficiently attended to by either of the parties.

Before the final hearing they will doubtless realize their importance and present them with more method and accuracy to the court.

In my judgment, the real and turning point in the case is whether or not, regarding the probable travel and transpor-
322 tation across the bridge by railroad cars and as a common highway, and, also, the business depending upon the free navigation of the river, up and down, at this place, the draw or draws will furnish reasonable means to present any substantial obstruction to such navigation—that is, a navigation from being seriously or materially impaired.

Now, this is a question of fact, and in looking at it with a
323 view to an intelligible determination, the extent of the travel and transportation across the bridge must be inquired into, and every railroad train of cars, and every vehicle, animal or person, crossing in the course of common highway transportation or travel, will necessarily require the draw or draws to be closed, when the navigation must, in fact, be obstructed. Will the closing of the draws, for the
324 accommodation of this transportation and travel, be compatible or consistent with the fair use of the river for the purposes of the transportation of freight and persons by steam vessels and other water craft at this point, up and down the same? The data for the solution of this question is not sufficiently before us.

It is manifest that the crossing at this point in both di-
325 rections will be great, whether the conflict may not be reconciled by means of proper draws, so that each privilege or right claimed may be reasonably enjoyed, it is not for me, at present to say. Indeed, it is impossible to give

any satisfactory judgment in the matter upon the present proofs in the case.

Some idea of the extent of the business as confined to 326
railroad trains, may be derived from a perusal of the 12th section of the charter. It provides, that "any railroad corporation whose road now has, or shall have a terminus at, or shall run its trains to or from the said city of Albany, or East Albany, or shall run its trains in connection with any road having such terminus, shall be permitted to use said bridge for railroad purposes, upon such terms as the directors of the several companies interested may agree; 327
and in case they shall not be able to agree, the terms shall be fixed by the Canal Board.

Under this clause, all the railroads running to and from Albany or East Albany, and all roads running in connection with them, are entitled to the benefit of the use of the bridge. This includes all the several lines of road leading to and from these points now in operation, or that may be hereafter constructed; and, in addition to this use, is to be 328
taken into the account, the use for common travel as a public highway.

As to the business up and down the river carried on by vessels propelled by steam and sails, some idea may be gathered of the extent of the business, and of the number of passages through the draws, from a fact stated by several witnesses, that at least seven-eighths of all the freight 329
upon the Western and Northern canal arriving at, and leaving tide-water, enters and leaves the Hudson River at West Troy; and in addition to this, is to be added the business growing out of the coasting trade carried on with the towns above the bridge.

There is a question, also, involved in this case that I desire to have discussed. Mainly, how far the personal 330
duties and obligations imposed upon the grantees of the charter of a bridge to remove obstructions to the navigation occasioned by the erection, should be taken into the account in determining the question of its lawfulness.

This assumes that the construction would operate as an impediment to navigation, but that it could be relieved by
331 the agency of the grantees, as the obstructions occurred. For instance, in this charter, it is made the duty of the defendants to keep in readiness steam tugs to tow sailing vessels through the draw; also, that they shall not suffer sand bars to continue that may be formed by reason of the erection of the bridge or piers, but shall remove the same.

Suppose that the draw constructed would not admit of
332 the passage of sailing vessels without the aid of the tug, would this provision of the charter legalize the bridge? Again, suppose it should be admitted that the piers of the bridge would be the means of the formation of bars above and below them, so as to impede navigation, would the duty enjoined upon the defendants in the charter to remove the obstruction answer the legal objection to the bridge? This question, so far as I know, is new, and, as a general
333 principle, is of very great importance, and may have a considerable bearing upon this case in the final hearing. The opening and closing of the draw must depend more or less upon human agency; it must necessarily be so as long as it is admitted that a proper draw may relieve the bridge from obstructions to the navigation. The question is, how much farther may it be relied on, in cases where the bridge, from its construction, constitutes an obstruction
334 even with the proper management of the draw? Another question also may be involved in the final determination, requiring the most deliberate consideration; and that is, how far the business of commerce upon the rivers of the country—these great natural highways for the convenience of trade and intercourse—is to yield to the convenience and accommodation of the conveyance of passengers, the
335 chief and primary business and use of railroads. It is undoubtedly true, that these roads furnish very considerable facilities for the transportation of goods as well as of passengers, and deserves the fostering care and encourage-

ment of the government and country; but it will, probably, not now be denied, after the experience possessed of the 336
practical uses of them, that in the transportation of goods, especially heavy freight, they cannot compete with the great natural thoroughfares subjected to these uses by steam vessels and other water craft.

Great care, therefore, should be taken that the facilities thus furnished by a benificent Providence for the convenience of the business and commerce of the country, should not be so encumbered and obstructed by the erection of ar- 337
tificial means of crossing, as to render them virtually useless for the purposes of navigation. And it is especially important that some general principles should be arrived at in this case, which, while the fair and reasonable navigation of the river is secured to the public, every facility consistent with the same, may be extended to railroads in the passage across the stream. 338

The principles proper to be applied to this case, will be generally speaking applicable to every other instance of bridging this river, and it is apparent, that they must so regulate and control the erection, as that, however multiplied, as the exigencies and business necessities of the country may demand, the reasonably unobstructed navigation of the river is still maintained. No one can desire to see this great natural 339
thoroughfare seriously obstructed or its business and commerce materially crippled. The guarantees of the Constitution and acts of Congress, but harmonize in this respect with what must be the feelings and wishes of the whole business community.

A question once presented in this State in the Court of Chancery, and Court for the Correction of Errors, and de- 340
cided, namely, whether or not the navigation between different parts upon a public river within the same state came within the power to regulate commerce "among the states" need not be considered, as no such question has been made by the defendants. The affirmative has been maintained

by the highest authority in this state. (3 Cowen, 713. The
341 Steamboat Company vs. Livingston, 15 Wend., 114. The People vs. Saratoga and Rensselaer R. R. Co.)

Nor need we examine the question, whether or not the power in the State to authorize the building of a bridge across a public river navigable from the sea is not subordinate to that conferred by the constitution upon Congress to regulate commerce, as no such question has been made in the case. That the power in Congress is paramount was
342 conceded on the argument and was also in the fullest and broadest terms by the distinguished Judge (Chief Justice Savage) on delivering the opinion of the Court in the two cases already referred to.

Upon the whole, on the grounds, and for the reasons assigned we have arrived at the conclusions, that it is due to the rights and interests of the parties, as well as the ques-
343 tions involved, to enjoin the proceedings in the erection of the bridge until the final hearing of the case.

I would further suggest, that although neither of the parties has furnished me with an amendment of this charter by the legislature since the argument, and pending the consideration of the motion, it has come under my notice; and if the charter is to be regarded as a public act, we shall feel bound to consider it at the final hearing.

344 This amendment reduces the width of the draw, if but one, from two hundred to one hundred and eighty feet, and if two, from one hundred and fifty to one hundred and ten each.

It is true certain officers named may in their discretion direct these draws to be enlarged, but this qualification
345 presents a contingency we cannot notice or attribute any weight in passing upon the question involved.

It will be for the parties to consider, whether it will not be for the convenience of all concerned that in the preparation for the final hearing, the amendment of the charter be taken as modifying the original act, so as to embrace the whole case in one hearing.

Much of the evidence now before me relates to a bridge with the draws as originally prescribed, and of course, would be entitled to diminished weight when used to uphold the draws as altered in the amendment.

Let an injunction issue according to the prayer of the bill. 346

A copy as filed in my office, July 25, 1857.

A. A. BOYCE, *Clerk.*

DECISION OF THE BRIDGE CASES.

PRONOUNCED BY JUDGE GRIER IN THE U. S. DISTRICT COURT AT TRENTON, SEPTEMBER 22D, 1857.

CHARLES E. MILNOR, *vs.* THE N. J. R. R. Co., AND PROPRIETORS OF THE BRIDGES OVER PASSAIC & HACKENSACK.	*In Circuit Court of U. S. for District of N. Jersey.*	347
WILLIAM L. SHARDLOW, *vs.* THE SAME. DAVID BIGELOW, *vs.* THE SAME.	*In Chancery.*	348
CHARLES E. MILNOR, *vs.* NEWARK PLANK ROAD AND FERRY COM. AND THE PROPRIETORS, &c.	*Bills for Injunction against erection of certain Bridges.*	349
WILLIAM L. SHARDLOW, *vs.* THE SAME.		

The object of these five several bills is to obtain injunctions prohibiting the erection of certain bridges over the Passaic river. One of these is proposed to be erected at a point called the Commercial Dock, in the city of Newark, by the New Jersey Railroad and Transportation Company. 350 The other by the Newark Plank Road Company, near the mouth of the Passaic river, and some two and a miles below the wharves of the port of Newark. The erection of

these bridges is authorized by the Legislature of New Jersey. They are required to have pivot draws leaving two passages of sixty-five feet each for the passage of vessels
351 navigating the river or harbor. The first of these bridges is required in order to avoid certain curves in the railroad where it passes through Newark—and to make it straight. The other to accommodate the large and increasing commerce between the cities of New York and Newark, on the plank road connecting the lower end of Newark with Jersey city.

It will not be necessary to a proper consideration of the
352 several questions affecting the decision of these cases, to give an abstract either of the pleadings, or the testimony. Where opinions are received in evidence there can be no restraint as to quantity. Such testimony is always affected by the feelings, prejudices and interests of the witnesses, and is of course contradictory. A skipper will pronounce every bridge a nuisance, while travellers on plank or rail
353 roads will not think it proper that their persons or property should be subject to delay or risk of destruction, to avoid an inconvenience or slight impediment to sloops and schooners; owners of wharves or docks who may apprehend that their interests may be effected by a change of location of a bridge, are unanimous in their opinion that public improvement had better be arrested than that their interests
354 should be affected. In this conflict of testimony and discordant opinion, we shall not stop to make any invidious comparisons as to the credibility of the witnesses, but assume such facts as we believe to be proven, without attempting to vindicate the propriety of our assertions.

I. The first of the three great questions so ably discus-
355 sed by the learned counsel in these cases, is briefly and lucidly stated in the following propositions which complainants have endeavored to establish:

1st "That the Passaic river is a public highway of commerce, which under the Constitution of the United States, has been regulated by Congress."

2nd. "That the pre-navigation of the Passaic river as a common highway having been established by regulation of Congress, and by compact between the States it cannot lawfully be obstructed by force of any State authority or 356
Legislation."

3rd. "The bridges proposed to be erected by the New Jersey R. R. Company and Plank Road Company, will be each an obstruction to the free navigation of the Passaic river, and public nuisances."

"Consequently, this Court will enjoin their erection on complaint of any injured party." 357

So far as these propositions involve the facts of the case, we find them to be as follows:

Though a small and narrow river, it is navigable for sloops, schooners and the smaller classes of steamboats as far as the tide flows, some miles above Newark, at the upper end, and above this city there are several bridges with small draws and difficult to pass. These were all erected by authority of the State, and one of them more than fifty 358
years ago. The city of Newark has been made a port of entry by act of Congress, has some little foreign commerce, and some with ports of other States. Being in fact but a manufacturing suburb of New York, much the largest portion of her commerce is with that city, and carried on the rail and plank roads connecting them.

That the proposed bridges will in some measure cause an 359
obstruction to the navigation of the river, and some inconvenience to vessels passing the draws, is certainly true. Every bridge may be said to be an obstruction on the channel of a river, but it is not necessarily a nuisance. Bridges are highways as necessary to the commerce and intercourse of the public as rivers. That which the public convenience imperatively demands, cannot be called a public nuisance because it causes some inconvenience or affects the private 360
interests of a few individuals.

Now, if every bridge over a navigable river be not necessarily a nuisance, but may be erected for the public benefit,

without being considered in law or in fact a nuisance, though certainly an inconvenience affecting the navigation of the river, the question recurs, who is to judge of this
361 necessity? Who shall say what shall be the height of a pier, the width of a draw, and how it shall be erected, managed and controlled? Is this a matter of judicial discretion or legislative enactment? Can that be a nuisance which is authorized by law? Does a State lose the great police power of regulating her own highways and bridges over her own rivers, because the tide may flow therein, or as soon as
362 they become a highway to a port of entry within her own borders? In the course of seventy years' practical construction of the Constitution, no act of Congress is to be found regulating such erections, or assuming to license a bridge, over such a river wholly within the jurisdiction of a State, if we except the doubtful precedent of the Cumberland road, and during all this time States have assumed and exercised this power. If we now deny to the States, where
363 do we find any authority in the Constitution or acts of Congress for assuming it ourselves?

These are questions which must be resolved before this Court can constitute itself "arbiter pontium," and assume the power of deciding where and when the public necessity demands a bridge, what is sufficient draw, or how much inconvenience to navigation will constitute a nuisance.

364 The complainants in these several bills, in order to show jurisdiction in the Court, have stated themselves to be citizens of the State of New York. Their right to a remedy in the Courts of the United States is not asserted, on account of the subject matter of the controversy, nor do they allege any peculiar jurisdiction as given to us by any act of
365 Congress; but rest upon their personal right as citizens of another State to sue in this tribunal. It is very apparent, also, that the complainants, if not introduced as mere John Does or nominal parties (while those really contending are used as witnesses) are at least volunteers in the controversy,

"*post litem motam*," who have bought the right to an expected injury for the luxury of the litigation.

Without stopping to laud the exhibition of public spirit by citizens of a neighboring State, it is plain, by their own 366
showing, that they can demand no other remedy from this Court than would be administered by the tribunals of the State of New Jersey in a suit between her own citizens. A citizen of New York who purchases wharves in Newark or owns a vessel navigating to that port, has no greater right than the citizens of New Jersey. A Court of Chancery in 367
New Jersey would not interfere with the course of public improvements authorized by the State, at the instance of a wharf owner on the suggestion that a change in the location of a bridge would cause a depreciation in the value of his property. This is not a result, for which (if the Court can give any remedy at all,) it will interfere by injunction. The Court has no power to arrest the course of public improvements, on account of their effects upon the value of proper- 368
ty, appreciating it in one place and depreciating it in another. If special damage occurs to an individual the law gives him a remedy. But he cannot recover either in a court of law or equity, special damage as for a common nuisance, if the erection complained of be not a nuisance. A bridge authorized by the State of New Jersey cannot be treated as a 369
nuisance under the laws of New Jersey. That the police power of a State includes the regulation of highways and bridges within its boundaries, has never been questioned. If the Legislature have declared that bridges erected with draws of certain dimensions, will not so impede the commerce of the river, as to be injurious or become a public nuisance, where can the Courts of New Jersey find any au- 370
thority for overruling, reversing or nullifying legislative acts on a subject matter over which it has exclusive jurisdiction? Admitting for sake of argument, that Congress in the exercise of the commercial power, may regulate the height of bridges on a public river in a State below a port of entry, or may forbid their erection altogether, they have never yet

assumed the exercise of such a power, nor have they by any legislative act conferred this power on the courts. The bridges will not be nuisances by the law of New Jersey.
371 The United States has no common law offences, and has passed no statute declaring such an erection to be a nuisance. If so, a court cannot interfere by arbitrary decree either to restrain the erection of a bridge or to define its form and proportions. It is plain that these are subjects of legislative not judicial discretion. It is a power which has always heretofore been exercised by State Legislatures over
372 rivers wholly within their jurisdiction, and where the rights of citizens of other States to navigate the river are not injured, for the sake of some special benefit to the citizens of the State exercising the power.

But it has been contended, on the authority of a dictum of my own, in Devoe v. The Penrose Ferry Bridge Company, "that the Supreme Court have decided in the case of
373 Penn v. The Wheeling Bridge, (13 How. 579,) that although the Courts of the United States cannot punish by indictment, the erection of a nuisance on our public rivers, erected by authority of a State, yet that as Courts of Chancery they may interfere at the instance of an individual or corporation who are likely to suffer some special injury, and prohibit by injunction the erection of nuisances to the
374 navigation of the great navigable rivers leading to the ports of entry within a State." (3 *Amer. L. R. P.*, 83.)

It is true that this doctrine was enunciated as a corollary from the Wheeling Bridge case, on a motion for an interlocutory injunction against a bridge over a stream wholly within the territory and jurisdiction of Pennsylvania. On such motions, I have always refused to hear and definitively
375 decide the great points of a case. If there be a prima facie or even doubtful case shown, it is the interest of *both parties* that the interlocutory injunction should issue, and that the defendants should not expend large sums in erections which may *possibly* be treated hereafter by the Court as nuisances. In the cases now before us, the same course was pursued;

but after the full argument of this question on final hearing, and a most careful consideration of it, I feel bound to acknowledge that the dictum I have just quoted from the report of the case of the Penrose Ferry Bridge Company 376
is not supported by the decision of the Supreme Court in the Wheeling Bridge case. It is true that such an inference might be drawn from a hasty or superficial examination of the opinion of the Court as delivered in that case. But the point now to be considered, was not in that case, and could not therefore have been decided. No Judge in vindicating the judgment of the Court, can deliver maxims 377
of universal application, in every sentence, or oracles which may be read in two ways, one applicable to the case before him, and the other not. To sever the arguments of a Judge from the facts of the case to which he refers, will often lead to very erroneous conclusions. The fact that Pittsburgh has been made a port of entry may have been mentioned as an additional or cumulative reason why Vir- 378
ginia, should not be allowed to license a nuisance on the Ohio, below that city. But the question whether the power to regulate bridges over navigable rivers wholly within the bounds of a State, could be exercised by it below a port of entry, and whether the establishment of such a port did *ipso facto* divest the State of such a power was not in that case, and therefore not decided. This assertion will be 379
fully vindicated by a careful examination of the record in that case.

1. It must be noted as a circumstance of that case, that although the State of Pennsylvania in her corporate capacity was complainant, and "*propter dignitatum*" entitled to sue in the Supreme Court of the United States; yet, that when the bill was filed, the same complaint might have been sustained in the Circuit Court of the United States, 380
or the bridge might have been prostrated as a nuisance by indictment in the proper State Court of Virginia. The bill charged that the bridge proposed to be erected was in utter disregard of the license granted by its charter, which

carefully forbid the least interference with the navigation of the Ohio. On the facts charged and proved, a Court of
381 Chancery of Virginia would have been bound to enjoin the erection of so palpable a nuisance to the navigation. The case therefore presented every fact necessary to give the Court jurisdiction—a party having a right to sue in the Court—a nuisance proposed to be erected without the sanction either of Virginia or the United States, and great special damage to the plaintiff.

382 2. During the pendency of this suit the legislature of Virginia saw proper to come to the assistance of their corporation, in the unequal contest, and at its suggestion enacted that the bridge proposed to be built contrary to the license granted to the corporation, was according to it, and not thereupon to be considered as a nuisance by the laws of Virginia—notwithstanding that the bridge was without a draw, and for many days in the year would
383 wholly obstruct the passage of steamboats.

3. This Legislation of Virginia being pleaded as a bar to further action of the court in the case, necessarily raised these questions.

Could Virginia license or authorize a nuisance on a public river, flowing, which rose in Pennsylvania and passed along the border of Virginia, and which, by compact between the States, was declared to be "free and common to all the citi-
384 zens of the United States?" If Virginia could authorize any obstruction at all to the channel navigation, she could stop it altogether and divert the whole commerce of that great river from the State of Pennsylvania, and compel it to seek its outlet by the railroads and other public improvements of Virginia. If she had the Sovereign right over this boundary river claimed by her, there could be no measure to
385 her power. She would have the same right to stop its navigation altogether as to stop it ten days in a year. If the plea was admitted, Virginia could make Wheeling the head of navigation on the Ohio, and Kentucky might do the same at Louisville, having the same right over the whole river

which Virginia can claim. This plea, therefore, presented not only a great question of international law, but whether rights secured to the people of the United States, by com- 386
pact made before the Constitution, were held at the mercy or caprice of every or any of the States to which the river was a boundary. The decision of the Court denied this right. The plea being insufficient as a defence, of course the complainant was entitled to a decree prostrating the bridge, which had been erected *pendente lite*. But to mitigate the apparent hardship of such a decree, if executed uncondi-
tionally, the court, in the exercise of a merciful discretion, 387
granted a stay of execution on condition that the bridge should be raised to a certain height or have a draw put in it which would permit boats to pass at all stages of the navigation. From this modification of the decree no inference can be drawn, that the Courts of the United States claim authority to regulate bridges below ports of entry, and treat all State Legislation in such cases as unconstitutional and
void. 388

It is abundantly evident from this statement, that the Supreme Court, in denying the right of Virginia to exercise this absolute control over the Ohio river, and in deciding that as a riparian proprietor she was not entitled, either by the compact or by constitutional law, to obstruct the com-
merce of a supra-riparian State, had before them questions 389
not involved in these cases and which cannot affect their decision. The Passaic river, though navigable for a few miles within the State of New Jersey, and therefore a public river, belongs wholly to that State ; it is no highway to other States, no commerce passes thereon from States below the bridge to States above. Being the property of the State, and no other State having any title to interfere with
her absolute dominions, she alone can regulate the harbors, 390
wharves, ferries, or bridges, in or over it. Congress has the exclusive power to regulate commerce, but that has never been construed to include the means by which commerce is carried on within a State. Canals, turnpikes, bridges and

railroads are as necessary to the commerce between and
391 through the several States, as rivers. Yet Congress has never pretended to regulate them. When a city is made a port of entry, Congress does not thereby assume to regulate its harbor, or detract from the sovereign rights before exercised by each State over her own public rivers. Congress may establish post offices and post roads; but this does not affect or control the absolute power of the State over its highways and bridges. If a State does not desire the ac-
392 commodation of mails at certain places, and will not make roads and bridges, on which to transport them, Congress cannot compel it to do so, or require it to receive favors by compulsion. Constituting a town or city a port of entry, is an act for the convenience and benefit of such place, and its commerce; but for the sake of this benefit the constitution does not require the State to surrender her control over the
393 harbor, or the highways leading to it, either by land or water, provided all citizens of the United States enjoy the same privileges which are enjoyed by her own.

Whether a bridge over the Passaic will injuriously affect the harbor of Newark, is a question which the people of New Jersey can best determine, and have a right to determine for themselves. If the bridges be an inconvenience to sloops and schooners navigating their port, it is no
394 more so to others than to them. I see no reason why the State of New Jersey, in the exercise of her absolute sovereignty over the river, may not stop it up altogether, and establish the harbor and wharves of Newark at the mouth of the river. It would affect the rights of no other State. It would still be a port of entry, if Congress chose
395 to continue it so. Such action would not be in conflict with any power vested in Congress. A State may, in the exercise of its reserved powers, incidentally affect subjects entrusted to Congress without any necessary collision. All railroads, canals, harbors or bridges, necessarily affect the commerce not only within a State, but between the States. Congress, by conferring the privilege of a port of entry

upon a town or city, does not come in conflict with the police power of a State exercised in bridging her own rivers below such port. If the power to make a town a 396
port of entry includes the right to regulate the means by which its commerce is carried on, why does it not extend to its turnpikes, railroads and canals, to land as well as water? Assuming the right (which I neither affirm or deny) of Congress to regulate bridges over navigable rivers below ports of entry, yet not having done so, the Courts cannot assume to themselves such a power. There is no 397
act of Congress or rule of law which Courts could apply to such a case. It is possible that Courts might exercise this discretionary power as judiciously as a legislative body, yet the praise of being "a good Judge" could hardly be given to one who would endeavor to "enlarge his jurisdiction" by the assumption, or rather usurpation, of such an undefined and discretionary power.

The police power to make bridges over its public rivers 398
is as absolutely and exclusively vested in a State as the commercial power is in Congress; and no question can arise as to which is bound to give way, when exercised over the same subject matter, till a case of actual collision occurs. This is all that was decided in the case of Wilson vs. The Blackbird Creek, &c., (2 Peters, 257.) That case has been the subject of much comment, and some miscon- 399
struction. It was never intended as a retraction or modification of anything decided in Gibbons vs. Ogden, or to the exclusive power of Congress to regulate commerce. Nor does the Wheeling bridge case at all conflict with either. The case of Wilson vs. The Blackbird Creek, &c., governs this—while it has nothing in common with that of the Wheeling bridge. 400

The view taken by the Court of this point dispenses with the necessity of an expression of opinion on the questions on which so much testimony has been accumulated. What is the proper width of draws on bridges over the Passaic, how far the public necessity requires them? What is the

comparative value of the commerce passing over or under them? What the amount of inconvenience such draws may be to the navigation, and whether it is for the public interest that this should be encountered rather than the
401 greater one consequent on the want of such bridges? and finally, the comparative merits of curved and straight lines in the construction of railroads. These questions have all been ruled by the Legislature of New Jersey, having (as we believe) the sole jurisdiction in the matter. They have used their discretion in a matter properly submitted to it, and this Court has neither the power to decide, nor the
402 disposition to say, that it has been injudiciously exercised.

II. The second great question in this case is not affected by the conditions of the first. The Court has undoubted jurisdiction to administer the relief here sought, if the complainants have shown themselves entitled to it.

It is charged that the corporation called the "Proprietors of the Bridges over the rivers Passaic and Hacken-
403 sack" have a right to bridge these rivers "exclusive of all other persons whatsoever, in such manner as that no other bridge can be erected within said limits, until the expiration of 99 years from the date of said original act (1790) without the consent of said Proprietors." It is contended, also, that a majority of the stockholders cannot by law surrender or release this exclusive privilege or franchise,
404 and that any law assuming to take away or authorizing any invasion of such franchise, impairs the obligation of the original and fundamental contract with and between the stockholders, and is therefore unconstitutional and void; and as a consequence, this Court having jurisdiction of the parties, is bound to protect their franchise from invasion, on the complaint of any individual stockholder.

405 In order to a clear understanding of this point, it will be necessary to give a brief, but, nevertheless, a somewhat tedious history of the legislative and other transactions connected with it.

Previous to the year 1790, the Passaic and Hackensack rivers had been crossed by means of ferries only. In that year the Legislature of New Jersey passed an act "for 406
building bridges over the Passaic, Hackensack, &c. As this act is somewhat anomalous in its provisions, and subject to misconstruction, it will be necessary to notice some of its provisions. The first section nominates certain commissioners, "who are authorized to put in execution the several services intended by this act." They are required to view the ground from Newark to Powles Hook, and fix 407
upon the most suitable and convenient site for a bridge, and are authorized to erect, or cause to be erected, a bridge over each of these rivers. The bridges must each have a draw of 24 feet, lamps, &c. After having agreed upon the sites of the bridges, they are required to lay out the roads to them. If the bridge be fixed at the ferry, the commissioners were to pay for the ferry rights; they were authorized also, at their discretion, to contract and agree 408
with any person or persons who would undertake to build such bridges for the tolls allowed by the act; and for so many years, and upon such conditions, as, in the discretion of the commissioners, should seem expedient. This agreement must be reduced to writing, signed and sealed by the parties thereto, and recorded, "and to be binding on the parties contracting as well as the State of New Jersey, and 409
as effectual as if the same and every part, covenant and condition thereof, had been particularly and expressly set forth and enacted in their law."

The 15th section enacts—"That it shall not be lawful for any person whatsoever, to erect or cause to be erected any other bridge, or bridges, over or across the said river Passaic, between its mouth and second river, &c."

In February, 1793, these commissioners entered into a 410
contract, by indenture with some thirty other gentlemen, reciting their powers under the above act. By this deed they "demised, granted, and to farm let" the said bridges

sixty-five feet wide, on which a light must be kept at night, and a careful person to open the draws for free passage of vessels, with the same provision as to reversionary interests
421 as is found in the 10th section of the original act. It requires also the consent of the "Proprietors of Bridges, &c.," in writing, under the corporate seal, and that the giving of such consent shall not, except as to the said bridge so consented to, be construed, held, or deemed in any manner to strengthen or impair any rights or privileges which the said "Proprietors may possess."

422 It is not worth while, for the purposes of this case, to inquire whether the "Proprietors of the bridges," &c., can claim any franchise of greater extent than that contained and accurately defined in their written agreement with the Commissioners. It clearly does not confer on them a right to build any other bridges than the two described and specified, or take tolls therefrom. They cannot be said there-
423 fore to have a monopoly for building of bridges within the boundaries specified in the act. The instrument called a lease of agreement defines the rights and the extent of the franchise granted to the company; and it may well be doubted whether the provisions of the 15th section which are wholly omitted from their charter can be invoked as
424 any portion of their franchise. Nevertheless as the Legislature of New Jersey seem to have treated this section as in the nature of a covenant by the State, not to permit other bridges to be erected, which might injure the value of the franchise conferred on the "Proprietors" by the Commissioners, without the consent of the Corporation, we shall treat it as such—at best, it is no more.

425 If the Proprietors had the sole right to build bridges and take tolls, their whole franchises might have been condemned by the Legislature under their right of eminent domain. A title to a franchise is of no higher quality than a title to land. Such indiscreet contracts by a legislature cannot paralyze the arm of government and stop the

progress of improvement for a century. The Legislature without attempting to define their rights or compelling them to renounce them for a proper consideration have merely suggested a very easy mode of getting over the difficulty. The railroad is authorized to purchase out the 426
whole stock and franchise of the Bridge Company, by paying the full value thereof. Those stockholders who did not choose to accept such terms knew well the purpose and object of this transaction was to give to the railroad corporation the control of this claim to a monopoly by whatever might be its validity or extent, without a destruction of the other corporate privileges and faculties.

An acquiescence for more than twenty years in the exer- 427
cise of the right by the railroad, will hardly leave room to question it now, even if a majority of the stockholders should now be disposed to do so. But the parties now objecting, do not seem absolutely to deny the right of the railroad company to have a bridge over the Passaic somewhere, provided it be built so as to suit the private interest 428
of certain wharf owners. Their franchise to receive tolls and pass free on their own bridge will not be impaired by the change. Nor is there any evidence that the value of the bridge stock will be in any manner affected hereby. When the Legislature have decided that the public interests require the change of location of the track of a railroad, or a 429
bridge connected with it, a Court cannot be called on to enjoin such a change, because it will cause a depreciation of property adjoining it, nor can members of the bridge corporation in this case call for the intervention of the Court to protect them against the acts of the majority of the corporators, unless for some abuse of power to the injury of the corporated privileges or property of the minority. It 430
is no part of the corporate franchise of the proprietors, &c., that any of its stockholders who may chance to be wharf owners, shall wield their corporate privileges to enhance the value of their wharves.

This change of the position of the railroad bridge is authorized by law. It has the consent of the "Proprietors," and given in the manner pointed out by law, under the seal
431 of the corporation. In giving this assent the corporation, was acting within the scope of its powers, and in a case where the will of the majority must necessarily govern, when lawfully expressed. This is not a case where a majority of the Stockholders are employing the common fund for the accomplishment of a purpose not within the scope of the institution. The majority must decide what is proper compensation for any real or supposed injury
432 to their franchise of toll, which may result from the change of position of this railroad bridge.

If it be part of their franchise to license other bridges such a franchise can only be exercised by the Corporation under their common seal and at the will of a majority. But it is plain that another bridge erected without Legislative authority, might have been treated as a nuisance, for what-
433 ever may have been considered the nature of the supposed monopoly, neither the law, nor their own lease, authorized them to build another bridge, or to give a valid license to others. The Legislature admit that they are bound by contract not to authorize another bridge; but on the principle of "*volenti non fit injuria*," they have directed the railroad to obtain the consent of the corporation with whom this
434 contract was made; whether this covenant was made with them originally as partners or corporators, can make no difference in the case. In neither case can a single individual by his negative vote control the majority of the body, or compel it to give or refuse its consent as may suit the interest of an individual or a minority.

435 This supposed franchise of forbidding the Legislature from licensing a bridge over these rivers, seems to have been a puzzle for the learned lawyers of the State for half a century past; and, as it is claimed by a large number of highly respectable, influential and wealthy men, it has been treated with great reverence by the Legislature, and the more so,

as the lawyers could not agree in defining what it was. Some have fancied it an incorporeal hereditament in each stockholder, which cannot be affected by the act of another, having the quality of a polypus; and though divided into 436
one thousand parts or pieces, each one became a unit, or distinct whole; others have treated it as a right of common, in which "*quilibet totum habet et nihil habet*," an indivisible unit of which, if a man has not the whole, he has nothing—and consequently a majority cannot dispose of it. But we do not think it necessary to search the lumber garret of obsolete law, in order to give or show profound legal learning 437
to an absurd conclusion. The provisos in the different acts of the Legislature, which have been invoked as conferring their power of obstruction on each one of the thousand partners or stockholders, make no new grant of power or franchise, and clearly refer to other valuable privileges, without being open to such misconstruction.

Having, then, such evidence of the consent of the corporation as is required by law, we cannot say it is insufficient. 438
The allegations in the bill, of irregularity or fraud in the election of the officers of the corporation, and obtaining the act giving such consent, even if sufficiently pleaded, have not been proved, and require no further notice.

I am of opinion, therefore, on this point of the case, that the complainants have shown no legal right as stockholders of the corporation of "proprietors," &c., to interfere and over- 439
rule the act of the corporation.

Nor have they alleged or shown such an improper use of the common property of the corporation, or such deviation from its original purpose, or abuse of the trusts confided to it, as will entitle them to the interference of a Court of Equity.

The third and last question for consideration, is, whether the Railroad Company has, by any valid contract, covenant- 440
ed or agreed with the complainant, or those under whom they claim as assignees, that the railroad bridge over the Passaic shall be forever fixed at Centre street, so that the

company cannot, even with consent of the Legislature, and for their own and the public benefit, change the location of the bridge, shorten their road, and avoid difficult and dan-
441 gerous curves.

As we have already seen, the question of the expediency or necessity for the change of route on the road, is one not submitted to the judgment or discretion of the Court. If the Legislature has authorized it, the railroad have a right to proceed, unless bound by contract to maintain their bridge where it at present stands.

The answer denies the existence of any such contract.
442 Assuming that a contract which is to have the effect of forever restraining the improvement of this road at this point, can be proved by parol, those who aver it, must be held to clear, consistent, and undoubted evidence, as to the parties, the consideration and the precise terms of such contract. Have we such proof?

Without wishing to make any remarks which may appear
443 offensive to any of the highly respectable witnesses who have given such contradictory accounts of the transaction, it is too plain to be overlooked, that much of this conflict arises from the examination of persons as witnesses who are the real parties in interest. The transfer made *post litem motan* in order to constitute the complainant a party to the suit, is a veil too transparent to conceal the real parties
444 to the litigation.

But waiving this objection to the testimony of certain witnesses, as also any invidious comparison of the credibility of very respectable men, I must say that there is not such clear evidence of a contract, its consideration, its parties or its terms, as would justify a Court in decreasing its specific
445 execution.

It appears that originally the Railroad Company had purchased the Commercial Dock property, with the view of erecting their bridge there. As the town of Newark was then built, the railroad would pass along its lower boundary. At this time railroads were an untried experiment. It wa

a popular notion that it would be of great advantage to a town or city to have a railroad pass through its most frequented streets—that it would advance the value of property on the streets through which it passed, and increase 446
their commerce; and that curves in a railroad were preferable to straight lines, being much more graceful and no less useful.

From the prevalence of these notions, the popular feeling became much excited; and the more so, that certain individuals of wealth and influence, who owned wharves on 447
the river, had shrewdly discovered that it would add considerably to the value of their property, if the railroad instead of crossing below it, could be bent round behind it, and crossing above create an obstruction to the navigation of the river above their wharves. Public meetings were held, exhorting and entreating, and advising the Railroad Directors. Suits were brought by lot-holders in the name of the Attorney-General, threatening them with injunc- 448
tions. Some wanted one thing, some another, and the result is perhaps best described in the graphic language of one of the witnesses:

"*I can only say, that according to my recollection now, there was much confusion and conflict of wishes among all the parties, and I don't know how many parties I could count up. I knew* 449
there was sharp speeches and feelings exhibited, as much so as upon anything I ever saw in this town, and to my views at the present moment, they were like two dogs that had been quarelling, until they got tired and left off, and there was a sort of common consent to abandon the conflict, and not to keep the progress of the work from going on, by a general assent of making the bridge where it is now. The location of the bridge was the 450
result, but that there was any contract or agreement that was to be final and conclusive and not to be revoked, I know no such arrangement as that. There was a cessation of the conflict and the work went on."

The Directors, desirous of conciliating the people of Newark, and expediting the completion of their road, yield-

ed to the pressure, and passed the following resolution, which had the effect of allaying the excitement. It is dated on the 24th of September, 1854, and is as follows:

451 "*Whereas*, Considerable diversity of opinion has prevailed among the citizens of Newark, relative to the location of the railroad bridge across the Passaic river, and the location mentioned in the annexed resolution having been agreed upon as a mutual accommodation of conflicting interests, and with a view to the settlement of all matters or controversy; now, therefore, be it

452 "*Resolved*, unanimously, that the Railroad bridge be located across the Passaic river at the north end of the dock owned by Moses Dodd, with a draw of forty-five feet in width, provided that the right of way from the westerly termination of said bridge, to the entrance of the avenue on Market street, can be obtained on reasonable terms, and provided also, that the owners of property on the above men-
453 tioned part of the route of the Railroad, shall agree that the Company may use any moving power thereon which they shall deem proper."

And on the 26th of December, the following resolution was passed:

"*Whereas*, it is desirable that the bridge across the Passaic river be definitely located, and whereas further delay in
454 order that all difficulties may be removed, is not deemed expedient, therefore—

"*Resolved*, That the bridge across the Passaic river be, and the same is hereby definitely located, immediately north of the dock lately owned by Moses Dodd."

These resolutions of the Board, for the purpose of proposing an accommodation of conflicting interests and put-
455 ting an end to controversy, seem to have brought the dispute to a close, and received general acquiescence. But these documents exhibit no contract, binding the corporation never to change the location of the road and bridge under any change of circumstances. They accordingly retained the Commercial Dock property, which was originally purchased for the purpose of a bridge. This proposition and

resolution of the Board was for the sake of peace. Those without had conflicting interests—they were bound to no conditions; they gave no consideration, except "*ceasing to quarrel when they got tired.*" Even the parties who had 456
brought suits to frighten the Directors were not bound to withdraw them.

The Directors exercised their own discretion under the circumstances. But time, which changes all things, has produced a great change in the circumstances. Newark has become a great city. Locomotives moving at a velocity of forty miles an hour, which were then considered 457
but the dream of the projectors, are now established facts. Curves have given way to straight lines, and the notion that railroad cars, darting through the most frequented streets of a city, are either a convenience or a benefit, has become obsolete. The conflicting interests which inexperience and ignorance had originally produced, need no longer to be propitiated for sake of peace. The people of 458
Newark no longer object to having the bridge located where it was originally intended to place it, and the people of New Jersey, by their Legislature, have determined that it would be beneficial to the public to have the old bridge, with its narrow and troublesome draws, taken away, a new one erected below with larger and better draws, and that the railroad should pass through the city by the shortest 459
route—by a straight line, and not with short curves.

The complainants have shown no contract made by themselves with the Railroad Company, nor have they shown any covenant running with the land on which they as assignees are entitled to a remedy at law, or relief in equity.

Having thus disposed of the three great points so ably discussed by the learned counsel, the minor issues of fact 460
or law have become immaterial, and need no further notice.

Let a decree be entered in each of these cases dismissing the bill with costs.

Per Curiam,

R. C. GRIER,
Circuit Judge.

CIRCUIT COURT

OF THE

UNITED STATES,

For the Northern District of New York.

ROBERT D. SILLIMAN,
vs.
THE HUDSON RIVER BRIDGE COMPANY,
AT ALBANY.

UNITED STATES,
Northern District of Illinois, } ss.

BE IT REMEMBERED that on the Fifteenth, Seventeenth, Nineteenth, Twenty-First, and Twenty-Second days of December, Anno Domini, One Thousand Eight Hundred and Fifty-Seven, personally appeared Wm. A. McPherson, Wm. A. Burton, J. W. Hibbard, Luther Nichols and H. A. Forse, before me, John W. Magill, a Commissioner appointed by the Circuit Court of the United States in and for the Northern District of Illinois, in the Seventh Circuit, under the Laws of the United States, to take affidavits and acknowledgments of bail, &c., to testify, and the truth to say, on the part and behalf of the Complainant in a certain suit or matter of controversy now depending and undetermined, in the Circuit Court of the United States for the Northern District of New York, on the Chancery side thereof, wherein Robert D. Silliman is Complainant, and The Hudson River Bridge Company at Albany, is Defendant, and the said witnesses being each of lawful age, and having been by me first severally cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid—did thereupon, testify and say as follows, viz:

1.—State your name, age, occupation and residence.

Answer.—My name is HENRY A. FORSE: I am 43 years of age: I am engaged in running a Steamboat as Captain; I have been so engaged since 1843; I reside in Davenport, Iowa.

2.—At what places have you been engaged in such business?

Answer.—From Pittsburgh to Cincinnati on the Ohio
4 River, from Evansville on the Ohio, Lafayette on the Wabash; during the last four years I have been on the Mississippi from St. Louis to St. Paul.

3.—Have you in this business had occasion to pass your vessel through draw-bridges; if yea, where, and how frequently?

Answer.—I have on the Wabash first, and on the Mississippi through the Rock Island Bridge; I have been some 20 times through it up and down, through the one on the Wabash a half a dozen times a month when the River was up, which is only during three months of the year.

5 4.—How many draw-bridges were there across the Wabash when you run a boat on the River and where was it situated and about what was the width of the draw?

Answer.—There was but one draw-bridge on the River when I ran a boat there, it was at Terre Haute; I think the draw was only 50 feet.

5.—Did you take tows in which you carried freight, or did you carry it on your Steamboat?

Answer.—I never towed any on the Wabash, but on the Mississippi I towed all last year; this year carried freight on Steamer principally.

6 6.—Are you acquainted with the Rock Island Bridge, its manner of operation, and its effect upon the navigation of the River over which it is placed?

Answer.—Well, I am to some little extent; I am probably not acquainted with it as much as some men are.

7.—Have you witnessed the passage of vessels besides your own through this Bridge, and their attempts to pass it, or its effect upon them?

Answer.—I have and have been on board of them up and down; I see them daily.

8.—What in your judgment is the effect of this Bridge
7 upon the navigation of the Mississippi River?

Answer.—Well, it is a great disadvantage I should think to Steamboats?

9.—State what the disadvantages consist in?

Answer.—Well, on account of wind which we have occasionally, we generally lose three days, can't go through it after night; you can't go through neither up nor down; when the River was in good stage of high water we could cross then at night both up and down before the Bridge was there; at low stage of water you cannot cross the rapids at night; before the Bridge was

built, in case of high wind and high water, there was no 8
difficulty experienced in going up or down the River; now
in very high water there are one third of the Boats who
could not make the Bridge at all, on account of the swiftness
of the current; before the Bridge was built we could all
go up.

10.—Will you state whether the passage at this point in
the River is made more or less dangerous by this Bridge,
and which?

Answer.—It certainly is a great deal more dangerous
than it was before; there was no danger at all before.

11.—What does the danger consist of? 9

Answer.—I know of nothing else but the Bridge being
there; the Boats are hard to manage in its draw and they
frequently run against the piers of the Bridge.

12.—In your judgment what is the effect of draw-bridges
to the navigation of the Streams over which they are
placed?

Answer.—They cause more risk to the Steamboat and
make it more expensive; they have done any way in this
case.

13.—State what inconveniencies, dangers, or expense
have attended your passage through the Bridge on the 10
Wabash River?

Answer.—Some delays on account of wind and high
water, being several times compelled to warp through, that
was the only difficulty I experienced, except at one time
getting too close to the draw, I knocked my wheel house
off.

14.—In your judgment can a draw-bridge used exten-
sively for Rail Road purposes, be placed over a navigable
stream where the navigation and commerce of the River
is extensive, without seriously injuring the navigation of
the River?

Answer.—Well, I don't think it could except a Suspen-
sion Bridge; I don't think the Wheeling Bridge is much 11
of an obstruction to the navigation of the River, because
boats can go under except at high water; they can build
a Bridge that would not seriously obstruct the navigation
of the River.

15.—How would it have to be built?

Answer.—Something similar to the Wheeling Bridge
only higher; I would have the vessels pass under.

16.—Are you acquainted with the sentiment of the
people engaged in navigating the Mississippi River past Rock
Island, with reference to whether or not, they consider the
Bridge there a serious obstruction and impediment to the

navigation of the River, and if so, state what that sentiment is?

Question objected to by Defendant's Counsel, as incompetent and immaterial.

Answer.—I am to a certain extent; a large majority of them consider it a great obstruction.

17. Where do most of these Captains and crews navigating vessels past Rock Island reside?

Answer.—Well, I can hardly say, they live from one end of the River to the other; the largest portion live at Saint Louis; but few of them live here.

18. How many of them are in town now?

Answer.—There are several Pilots here, but no Captains except myself.

19. Will you state whether or not, a difference has been made in the rates of Insurance, on vessels navigating past the Rock Island Bridge, by reason of that Bridge, and if so, state what that difference is?

Answer.—There has been a difference made, but I don't recollect what the amount is, of course it is higher: I heard what the amount is that was increased on freight.

20. What is the difference on the freight or cargo?

Answer.—From a half to one per cent. on the dollar, more than it was before.

21. How much would be the value of an ordinary cargo passing the Bridge?

Answer.—I could not say exactly; in a full cargo of groceries it would amount to from 20,000 to 50,000 dollars.

Direct examination closed.

H. A. FORSE.

Cross-Examined.

x1. What is the name of your Boat and who are the owners, and where do they reside?

Answer.—My Boat is named the Belfast; I am part owner, one Charles Connelly and Erastus Carlton are the others; Connelly lives here and Carlton at Le Claire.

x2. Is this the Boat that you have run for the last four years, if not, state what boats you have run for the last four years, and who are their owners?

Answer.—The Belfast is not the boat that I have run for the last four years; the Mary C. was the first one, she was owned by Burrows and Prettyman, of Davenport, Iowa; the next was the Fire Canoe, owned by myself and Charles Connelly, and the next the Belfast; I ran the Mary C. in part of 1854 and all of 1855; I ran the

Fire Canoe, the fall of 1856 and part of 1857; I have
run the Belfast since; I ran the Mary C. generally be-
tween St. Louis and Rock Island, and some times to St.
Paul; the other two I ran pretty much the same way;
the Fire Canoe was the fastest of these Boats; the Belfast
is the largest, she is a steam wheel Boat, and is 31 feet
beam and about 160 feet in length on deck; the Mary
C. was also a stern wheel Boat; I don't recollect what
her dimensions were; the Fire Canoe, was also a stern 17
wheel Boat; I think nearly 24 feet beam and about 157
feet in length on deck; my Pilots on the Belfast this
season, was Levi Williams and James Coleman; on the
Fire Canoe, Peter Hall occasionally and Coleman and
Williams the balance of the time; on the Mary C.
had Peter Hall part of the time, Harry White and Cole-
man and Williams, who both reside at Davenport; they
are not at home now; Peter Hall resides at Davenport
and is at home now; I can't say exactly how many trips 18
I made on the Mary C. in 1853; when running I
generally make a trip every two weeks from St. Louis to
St. Paul and back; I have made about the same number
of trips with each vessel in the same length of time that I
run; the first season I did not make so many; I suppose
I would make as many trips in the part of the season that
I run in as last season; the trips during the last four years
are pretty much on an average, they would not vary much; 19
my Pilots have never run my Boat in the Rock Island
Bridge; not any one of my Boats has hit the Bridge;
the narrowest channel between St. Louis and St. Paul, is I
believe, on the lower rapids; the rapids commence at
Keokuck and end near Montrose; the channel through
the rapids in some parts is terrible crooked, and in some
parts it is straight; in dead low water the channel in some
places is not over 30 feet; there is no channel at high water
because there is no necessity to regard it. If my Boat was
light enough I could run her through this 30 foot channel 20
at dead low water; at an ordinary stage of water, or what
is termed by Pilots, a business stage of water, they don't
pretend to run the channel; I can't say at what rate the
current runs there, in some places it is very swift; I can't
tell the width of the channel on the rapids above the
Bridge, we sometimes have difficulty in running through
the upper rapids; if the boat is loaded too heavy we get
aground sometimes; the difficulties is the swiftness of the
water and the rocks which are near the surface in low 21
water; I can't tell the swiftness of the current, I have no
idea; in high water it does not run as swift as it does

through the Bridge; in very low water I don't think there is much difference; at an ordinary stage I think it runs swifter in the draw than at any other place; I could run the rapids in high water if there was a high wind and no Bridge there; at an ordinary stage of water to run in a
22 high wind over the rapids it would depend a good deal on how much water your boat would draw; you could not run the rapids having a full load and drawing all the water, you could not run it in high winds.

x3. Name some of the Boats that you have seen run against the piers?

Answer.—I saw the Tennessee Bell and The Saracen, these were all I saw; I never ascertained how much they were injured.

x4. About how many times have you been aground on the rapids about the Bridge?

Answer.—I suppose I have been aground at least a half
23 a dozen times, on the Rock Island Rapids; I can't say how often I have seen vessels aground on the rapids, have seen them several times; I only know of one or two boats who have run up to the rapids and had to back down again, but that was because they drew too much water; I know the Sycamore Chain; I have never had to run up to that Chain and had to back down again; I don't recollect of ever seeing any boat do it.

24 x5. Can a vessel loaded, at any time in a low stage of water, and high wind pass up the Rock Island Rapids, when the vessel can't pass the Bridge?

Answer.—You can't load a vessel at a low stage of water and take her over the rapids.

x6. Loaded suitably then?

Answer.—In a low stage of water they can't pass the rapids in high wind drawing all the water; a vessel can't pass the rapids when she can't pass the Bridge during a high wind and low water.

x7. Which is the most difficult in low water and high wind, passing through the Rock Island Rapids, or the
25 draw of the Bridge?

Answer.—From what experience I have had on the River, I think the Bridge is the most.

x8. How comes it then that you have been aground often on the rapids and have never hit the Bridge?

Answer.—Well, a man would take more chances going through the rapids than he would through the Bridge; there is not so much danger in getting aground, as there would be in striking the Bridge.

x9. How much more injury would a vessel and its

cargo be likely to receive from hitting the pier of the Bridge than getting aground on the Rapids? 26

Answer.—That would depend altogether upon how hard she would strike the pier.

x10. How hard would she be likely to hit the pier to injure the vessel, judging from what you have seen in vessels hitting the pier, and what you have seen vessels getting aground on the rapids?

Answer.—I never saw my Boat injured from being aground on the rapids: I have seen other boats aground: I don't know how hard they were aground, or how much they were injured.

x11. Have you ever seen any vessels sunk on the 27 rapids, or do you know of any being sunk on the rapids?

Answer.—I have, a Boat that I chartered and was running was sunk there.

x12. Now Captain don't you know that it is a common thing every season for vessels to get sunk on these rapids, more or less?

Answer.—Yes, I have heard great talk about boats getting sunk there; I have heard of the Mason.

Solicitor for Complainant objects to that part of the witnesses' answer which is hearsay, on the ground that it is 28 improper.

x13. Have you ever known of a vessel being sunk from hitting the Bridge, or from any injury in passing through the Bridge, if so, state the vessel, the time and the circumstances attending it, and who the Pilot was?

Answer.—I never knew a vessel to be sunk from hitting the Bridge, but I have known them to be nearly full of water after they landed at Rock Island; I could not state the time, but I think it was a year ago this last spring; I can't tell the circumstances; I did not see her, they said 29 she struck the Bridge, and it injured her so that she came very near filling with water. I can't tell where she hit the Bridge, but I went over to see her, she was stove in the side; I don't know anything about how the wind was at the time she struck; her name was the Henry Graff; I don't know whether she had any cargo, or whether her cargo was injured.

x14. What Company have you ever insured a cargo with?

Answer.—I have never insured a cargo.

x15. How do you know then that insurances are from 30 half to one per cent. higher in consequence of the Bridge.

Answer.—I have been told by shippers who ship goods on the Boats, that that is what they have to pay. I have

been told so also by the Agents of some Insurance Companies; I don't know their names.

31 x16. State where these shippers live, and their names, that have told you so.

Answer.—The shippers some of them live at St. Louis: D. H. Jannary & Co.: I was told at their store; it was by some of the men shipping freight at his house; I am not sure whether Jannary told me so or not; I think that the name of the Insurance Company was The Fire & Marine Insurance Company, of St. Louis; I could not say what the name of the Agent was.

32 x17. What other Insurance Companies insure on the River, and where are they situated?

Answer.—I do not know; I never did any insurance myself on cargo or Boat.

x18. What was the rate of insurance on a cargo before the Bridge was built?

Answer.—I don't know.

x19. Do you know that the Marine Insurance Company at St. Louis, that you spoke of, has increased its rates on account of the Bridge?

Answer.—I have been told it had, that is all I know.

x20. Who told you?

33 *Answer.*—I don't know exactly, I heard them talking about it; I don't know who it was.

x21. How came you to swear on your direct examination that you could not tell how much the rates of insurance were increased on a vessel, but that on the cargo it was increased from a half to one per cent?

Answer.—I never had any insurance on vessels, I only know from what others said, that is the only answer I can give. I don't know that I did swear so; I stated that I was told so. I see on looking over my testimony that there are a great many errors in it.

34 x22. How much do you charge for freight in addition to what you used to before the Bridge was made—in consequence of the Bridge?

Answer.—Well I do not know; I don't think there is much difference made.

x23. Do you know whether there are any companies out of St. Louis that insure Boats or cargoes on the Mississippi?

Answer.—Nothing only what I have heard.

x24. How many times have you been detained in con-
35 sequence of the Bridge, and state when, and the circumstances?

Answer.—I could not tell how many times—it has not

been very often; one time by the darkness of the night, bound down, from a little after dark to day-light we were detained; got to Moline after dark, and had to lay from a little after dark to day-light.

x25. Is Moline above the Rock Island Rapids?

Answer.—No, it is not, it is above the Bridge,—it is 36
above the Rock Island Chain of the Rapids.

x26. Have you not testified that you could not pass the Rapids in the night at any time?

Answer.—No, I have not.

x27. Is that the only time you have been detained?

Answer.—I have been detained several times.

x28. Can you specify any other particular time?

Answer.—No, not particularly I can't, but I think it was generally after dark, on account of the night.

x29. Is the Rock Island Bridge unfavorably located in 37
regard to its effect upon navigation?

Answer.—I can't say that it is.

x30. What business were your partners, Burrows & Pretty, engaged in before the Bridge was built?

Answer.—They never were partners of mine.

x31. Did you swear that boats could not pass the Bridge at night since it was built?

Answer.—I did.

First Answer.—Yes sir; I have never run mine, and have never known any to run through there at night. 38

x32. How many daily line of Packets pass the Rock Island Bridge, and name them?

Answer.—Only one that I know of I believe; I think it is called the Rock Island and Galena Packet.

x33. Do any of the boats of that line pass the Rock Island Bridge at night?

Answer.—Not that I know of.

x34. What boats compose that line?

Answer.—I think the Alhambra and Kate Castle are running there this season. 39

x35. What time do these Boats leave Rock Island and arrive there?

Answer.—I cannot say exactly; I think they leave Rock Island at nine o'clock in the morning; I could not tell exactly at what time they arrive in the evening; I have seen them coming down at from five and six o'clock in the evening; I have never seen them coming down at seven or eight o'clock, or nine o'clock in the evening; their ordinary time for returning is in the evening, about 5 or 6 o'clock; I have seen them come down about that 40
time.

x36. Do you pretend that it is dangerous to run through a channel 125 feet wide with a vessel of less than 50 feet beam?

Answer.—It depends on where the Channel is, and whether it is night or day, and what kind of a place it is; if it is a plain river and nothing in the way there would not be much risk. H. A. FORSE.

Sworn to before me, this 15th day of December, A. D., 1857.

JNO. W. MAGILL,
United States Commissioner,
Northern District of Illinois.

41

1. State your name, age, occupation and residence.

Answer.—My name is WILLIAM A. MCPHERSON; my age is thirty-seven years; I am a Master Mariner by occupation; I reside in Chicago.

2. Have you ever been engaged in navigating the Chicago River; if so, from what time to what time, in what capacity, and with what kind of vessels?

Answer.—I have been engaged in navigating the Chicago River; I have been Master of a Tug in the Creek four years last past.

3. For what purpose has your Tug been used for these
42 last four years in the Chicago River?

Answer.—For towing Vessels and Canal Boats; principally sail vessels in the Chicago River.

4. Are you acquainted with the draw-bridges on the Chicago River, their manner of operation, and their effect upon the navigation of the River?

Answer.—I am acquainted with the draw-bridges on the Chicago River, and with their manner of operation; and I am acquainted with their effect upon the navigation.

5. How frequently have you had occasion to pass these
43 Bridges with your Tug and her tows?

Answer.—From 15 to 20 times a day; sometimes more, and sometimes less.

6. What in your judgment is the effect of these Bridges upon the navigation of this River—injurious or otherwise: and if injurious, to what extent?

Answer.—Well, they don't get the Bridges open in time for us; the Bridges get jammed some way, so they can't get them open; of course they are injurious to navigation when the way aint clear for us. It is a great injury to navigation, because we are detained a great deal, and made
44 liable to collisions and damages.

7. Will you state the trouble and difficulty which ves-

sels have in navigating this River, in consequence of the Bridges?

Answer.—Well, there are a great many times when we have to let go and anchor, and get out a line to stop the vessels; and at other times when tows meet, they are apt to collide in passing the abutments; there are times too, when vessels lay so near the abutments, that other vessels cannot pass them, without being liable to do damage. There are some of those Bridges, which are Rail Road 45
Bridges, that detain us by cars passing. They never have stopped the cars for the Bridge to open for me, but go right on and make us wait.

8. Will you state whether or not, vessels are as safe in navigation through these draws as in the unobstructed portions of the River; and if not, to what danger are they exposed in passing the draws, and the kind of injury resulting to vessels therefrom?

Answer.—They are not as safe; as I said before, we often meet vessels in the Bridge, with just room enough for them to pass, but not room enough for them to steer, or to swing; 46
they are liable in such cases to collide and carry away their yards. The vessels in such cases are liable to considerable injuries, to damage their spars, yards, and their sides in passing.

9. What kind of a stream is the Chicago River as to its formation and current?

Answer.—Well, the water comes from the Lake, we have no current much; sometimes after a heavy rain we have a little current, but it don't amount to anything.

WM. A. McPHERSON. 47

Direct Examination closed.

Cross-Examined.

x1. How many Tugs have been in use in the Chicago River during the last four years?

Answer.—Well, this season, there is some 14 or 15 that run in the River; there has not been so many in two years back; I should say about ten, running in the river previous to this season.

x2. Has your Tugs passed the Bridges on an average, oftener than each of the others; and if so, state how much oftener. 48

Answer.—No sir; some days we might, and other days we might not; just happens according to the amount of towing.

x3. Do you own the Tug you run?

Answer.—I do not.

x4. Who does own her?

Answer.—F. B. Gardner & Co., own the one I was in this season.

x5. Have you ever owned any Tug?

Answer.—No sir.

x6. Where do F. B. Gardner & Co., live?

Answer.—They live in Chicago; their office is on Wells Street?

49 x7. How long have they lived or done business in Chicago?

Answer.—Well, I could not tell. I have known them to do business here some four or five years; but how much longer they have been here I can't say.

x8. Where did they come from?

Answer.—Can't tell you sir.

x9. How many Tugs do they own?

Answer.—The only one they own is that which I sailed this season.

x10. How long have you lived in Chicago?

Answer.—I am in Chicago the last six years steady.

x11. What was your business before you commenced running a Tug.

50 *Answer.*—I followed sailing.

x12. Where, and in what capacity?

Answer.—I sailed the lakes from here to Buffalo, and also to Lake Ontario; some part of the time before the mast, and some part of the time as Mate. I never was Master of a sail vessel.

x13. Have you been Master of any Vessel but a Tug?

Answer.—Yes sir; I have sailed the Steamboat Columbia.

x14. When, and how long?

Answer.—Four years ago, I think it was; I was not in her quite all the season; I sailed her the latter part of the

51 season, and in the fore part I sailed a Tug.

x15. How many Bridges were there over the Chicago River when you began to run a Tug?

Answer.—When I first commenced to run a Tug, I think there was but six Bridges in running from the Lake to the head of the South Branch; at that time, on the North Branch I think there was not but two. I forget whether the Rail Road Bridge was across the North Branch when I commenced running, but I think it was not.

x16. How many of these Bridges were Pivot Bridges?

Answer.—I think there was not but one, that was Lake

52 Street Bridge, when I first commenced running.

x17. How many of them were Float Bridges?

Answer.—Well, I think there were five on the South

Branch, and I believe but one on the North Branch; one at Chicago Avenue was then a Hoisting Draw-bridge.

x18. Which kind of a Bridge is most objectionable to navigation.

Answer.—Well, those that swing on the centre are the best Bridges, they are not so much of an obstruction to 53
navigation, they swing them quicker.

x19. Which kind of Bridge most injures navigation?

Answer.—Those Float Bridges give the most trouble.

x20. Is not the navigation less obstructed by the Bridges since the Pivot Bridges were adopted?

Answer.—Well, I think they are a little better since they got those; they can pass better.

x21. Are vessels as often delayed since the Pivot Bridges were adopted as before?

Answer.—Well, no sir; I don't think they are quite.

x22. Do you know the charge for towing, and if so, state what it is? 54

Answer.—Well, we have different prices, from $5 to $10; our lowest price is $3; the prices depending upon the vessels towed, the distance, and the shape they are in, and sometimes Tugs get as high as $1000; the Tug McQueen did this fall; she towed a vessel into Port in a storm; the vessel had lost her anchors and sails was covered with ice and drifting towards the shore; the charge for Canal Boats, for towing to Bridgeport, from any where this side of Twelfth Street, $3; from Twelfth Street up, $2; for a vessel of 200 tons, from the Piers to Polk Street, $5; for a longer class of vessels, $6 and $7; for towing 55
out grain vessels loaded, from Polk Street to the Lake, $10; from Wells Street out to the Lake, $7; from Clark Street out, 6; unless it is blowing and in that case we charge more.

x23. Are the prices which you have mentioned, those that have been charged during the whole time you have been engaged in towing?

Answer.—Well, the first time that I run a Tug here they did not charge as much as they do now; they have 56
been about the same for the last three years as they are now.

x24. How much less were the prices the first year, and why were they less?

Answer.—About one third less; well, we could get along a great deal faster with a tow at that time; there were not so many Bridges and there were not so many vessels in the Creek; now with more Bridges and more vessels you are liable to more jams.

x25. Which has most increased this difficulty, the in-
57 crease of vessels or Bridges?

Answer.—Well, I don't know; it is a pretty hard matter to tell which has most: I should say the vessels caused the most jam because of their winding and getting athwart ships of the River, with tows going up and down makes a regular jam.

x26. Which have you been oftenest delayed by, vessels or Bridges?

Answer.—Well, as I said before that the jams caused by vessels winding makes the most.

x27. Will you state particularly all the damages you
58 have sustained by the Bridges?

Answer.—Well, I could not get at that because it has happened at different times; there are some days that we have collisions three or four times a day; then again it will run along for three or four days without having any: I don't know as I can recollect of any, it is something that I did not keep on my mind.

x28. Think if you can, and state particularly any instance of damage to your Tug, or the vessel you was towing, occasioned by the Bridge; describe the damage and men-
59 tion the which at which it occurred?

Answer.—Well, I don't remember of any vessel. I remember of damage I got done to my Tug this fall; my engine stopped and a vessel shoved me under the Bridge and knocked my Pilot House to pieces; it was at Lake Street Bridge.

x29. Do you remember any other damage, and if so, state it?

Answer.—I don't remember any to myself.

x30. What vessel were you towing that shoved you
60 under the Bridge?

Answer.—The Brig Young America.

x31. Where were towing her to?

Answer.—I was towing her to Flint & Wheeler's, on the South Branch.

x32. How came your Engine to stop?

Answer.—I don't know sir; we supposed though that her wheel struck a stick, we were going through very slow.

x33. Was the draw of the Bridge open?

Answer.—It was.

x34. Were you in the draw when the engine stopped?
61 *Answer.*—No sir, not quite.

x35. How far were you from the Bridge?

Answer.—Probably about 30 foot.

x36. What part of the Bridge did you run against?

Answer.—I run against both the Bridge and Abutment, but the Bridge part knocked my Pilot House down.

x37. Which part of the Bridge knocked your Pilot House down?

Answer.—The centre part; the first part of the centre pier is not very high out of the water, and they have drove spiles into the end to make it as long as the Bridge is up 62
and down the River; this new part that they built out is a little wider than the old part, and I was run under this new part which extended over the old part.

x38. Did the vessel you was towing, as she ran against you, turn your Tug out of her course?

Answer.—Well, very little; the vessel had to go close to the centre part of the Bridge, that shoved us you see into the centre part of the Bridge.

x39. Would your Tug have gone through the Bridge safely, if the Engine had not stopped?

Answer.—Yes, she probably would. 63

x40. If the centre pier had been built like that at the Rush Street Bridge, would you then have gone through safely?

Answer.—Yes sir, think I would; they could not have shoved us under the Bridge.

x41. State if you can any other instance of damage?

Answer.—I don't remember of any.

x42. State particularly, what instances of delay you have sustained by the Bridges, specifying how long you were delayed, and at what Bridge? 64

Answer.—I remember being detained about a half an hour at Clark Street Bridge; the vessel I had in tow, had to let go her anchor; this was last summer. Another at Wells Street Bridge—a vessel I had in tow ran into the Bridge, and broke the railing of the Bridge; I don't think it did any injury to the vessel; we were delayed about an hour there; I was detained once at the Rail Road Bridge, on the South Branch, for a half an hour, on account of the cars crossing; I don't remember any other instance of delay. 65

x43. State the cause of the delay at the Clark Street Bridge, that you spoke of?

Answer.—The Bridge was full of teams, and before they could get the teams off, there was a propeller in the way, and they had to swing the Bridge towards us; the propeller had just gone through the Bridge to a dock near the Bridge, and had not cleared her stern, so that they had to swing the Bridge towards us; if they could have swung

the Bridge from us, they would probably have got the
66 people off, and the Bridge open in time, as we were coming along slowly; the delay of half an hour was caused also, by getting up the anchor, and getting started again.

x44. Describe the cause of delay at the Wells Street Bridge?

Answer.—Well, it was about the same as the other; people on the Bridge and before they got them off, we had to go too close, so that they could not swing the Bridge in time for us; the vessel got foul of the Bridge, and we had to go to work and pull her out; I think we were as much
67 as an hour in getting her clear—her jibboom was foul of the arches.

x45. Will you state the cause of the delay at the Rail Road Bridge?

Answer.—From cars passing along; they made us wait until the train had passed over.

x46. What were you towing when you were delayed at Rail Road Bridge?

Answer.—The Barque Davie.

x47. How many trains passed while you stopped?

Answer.—There was only one train; that was going forward and back, and appeared to be switching.

x48. How many times have you been through the
68 Welland Canal?

Answer.—Well, I suppose fifty times.

x49. How many draw-bridges are there over the Welland Canal?

Answer.—I can't say how many; but I should judge from 29 to 30.

x50. Have you ever been injured or delayed by the Bridges over the Welland Canal; if so, state how much?

Answer.—I have not.

x51. Are the Bridges an injury to the navigation of the Welland Canal?

69 Question objected to by Complainant as immaterial.

Answer.—Well, they are not so much there as they would be in a River, because vessels are towed there by horses, like a Canal Boat; and there you have to send men ahead to open the Bridges; and the Bridges swing right over on the heel path, out of the way of the tow-path.

x52. How much has the commerce of Chicago increased during the last six years?

Question objected to by Complainant's Solicitor as immaterial.

70 *Answer.*—I should think it had doubled.

x53. Are not the Bridges a great convenience to the

owners and crews of vessels, in getting back and forth, between vessel and store house?

Question objected to by Complainant as immaterial.

Answer.—At times they are a great accommodation in getting across.

x54. Do you know any portion of the community interested in navigation who are in favor of the Bridges?

Answer.—The Bridges here, of course, are a necessary evil; we could not get along very well without them.

x55. On the whole, then, are not the Bridges a great convenience to the public? 71

Question objected to by Complainant as being immaterial.

Answer.—Well, yes sir; they are a great convenience to people passing, of course.

x56. Suppose all the teams and persons now passing the Bridges, were compelled to pass the River in Ferry Boats, would not the Ferry Boats be a greater obstruction to the navigation than the Bridges?

Question objected to by Complainant as immaterial.

Answer.—No sir, I don't think the Ferry Boats would obstruct as much as the Bridges; we have had ferries here 72 run with a line, and they never bothered us any, because they always slacked their line down and never detained us any.

x57. How long ago did you have ferries, and how many persons and teams crossed by them.

Answer.—We had a ferry for foot people to cross at Rush Street last season, and one this fall at Van Buren Street; the one at Rush Street has been in operation four or five years. I never saw any teams cross by these ferries, they were only calculated for foot passengers; it is 73 pretty hard for me to tell how many persons crossed by them; the ferry was pretty well crowded, and they crossed pretty quick back and forth.

x58. Suppose 12,000 foot passengers, and 4,000 teams per day passing by a ferry boat, would the boat more obstruct the navigation, than a Bridge like the Rush Street Bridge, passing the same number?

Question objected to by Complainant as immaterial.

Answer.—Well, that would depend a good deal on how wide the River was; you take this River, a ferry boat here 74 would not be in the way at all; because, when you blow your whistle, they slack their line, and you pass one side or the other; they would not be in the way while taking teams on board, because the teams would be going on board of them at one shore or the other.

x59. What was the length of the Ferry Boat used at Rush Street last year?

Answer.—Probably fifty foot long; might be a little less, and might be more.

x60. How many persons would it hold?

75 *Answer.*—Probably about fifty.

x61. How long did it take to cross the river?

Answer.—It would not take over a minute to haul across.

x62. What was the distance across?

Answer.—Where they haul across, about 200 feet; I don't know as it was quite that; there are times when it took probably more than that, when they were not in a hurry to cross, and no one pulled but the man alone.

x63. Do you think such a ferry boat at all the places where there are now Bridges across the Chicago River for

76 the transportation of the travel now passing those Bridges, would be a less obstruction to the navigation than the Bridges?

Question objected to by Complainant as immaterial.

Answer.—Well, such ferries as them, I think would be a less obstruction.

x64. How many trips a day would such a ferry boat have to make to carry 12,000 persons?

Answer.—Well, I don't know; I should have to figure it; on figuring it, it shows 2400.

x65. Well, suppose there are 12,000 persons and 4,000 teams to cross, how large a ferry boat would it require to

77 pass them over the River, so that the boat would be no obstruction to the navigation of the River?

Answer.—Well, you could not get a ferry boat to take that number over without its being an obstruction.

x66. Is not the difficulty of taking so many over by ferry boat, in regard to its effect upon navigation, increased by the fact that the River is so narrow?

Answer.—Well, you see the River is so narrow, it don't take long to cross; if it was a wide River, you could get them over with less difficulty than when the River is nar-

78 row; I think the difficulty would be increased if they had to carry so many.

x67. Suppose there were but 6,000 persons and 2,000 teams to pass by a ferry, would the boat be a greater obstruction to the navigation than the Bridge?

Question objected to as immaterial by Complainant.

Answer.—Well, that would depend a good deal on how the boat was fixed for it.

x68. Take any Boat that you think would be suitable

79 for a River of that width to carry that number.

Answer.—Well, I don't think you could get a Boat up here in this River, but what would obstruct the navigation.

x69. Considering the large amount of travel over the Chicago Bridges, do you think that Ferry Boats could be used for passing it without causing a serious obstruction to the navigation?

Answer.—Well, there are some Bridges here that you could not get along with a Ferry Boat, and there are some where one could get along with Ferries.

x70. Do you have a joint on the smoke pipe of your Tug? 80

Answer.—I have.

x71. When was the ordinance passed requiring Tugs to have joints in their smoke pipes?

Answer.—Last season.

x72. Was there any opposition to it, and if so, who opposed it?

Answer.—Yes sir, there was; the owners of Tugs and vessels opposed it; they opposed it in one way; they told the City that if it could get up any plan they could use, they would use it.

x73. How long did the owners of Tugs refuse to comply with the ordinance? 81

Answer.—Some ten or twelve days before they done any towing.

x74. Were not the Bridges closed against the Tugs during this time?

Answer.—No sir, not all of them.

x75. Which of them were?

Answer.—Randolph and Wells Street would not let a Tug pass unless she had a tow; some Tugs whose upper works were high they had to open for; my Tug was one of this kind.

x76. When did you put a joint in you smoke pipe and why?

Answer.—Well, the Tug that I was in last year has no joint in her smoke pipe; the one that I was in this Season has; that was put in in June; it is better for us with those high Bridges to have a joint in; you can pass under those Bridges then without any detention, when you have no tow of sparred vessels, with Canal Boats in tow we can go under, but all the Bridges are not so. 82

x77. Has not all opposition to this ordinance ceased, and if not, state who oppose it still?

Answer.—They shut right down on all the Tugs going through the Bridges; they were willing to have hinges in their pipes, if they got some plan that would work and 83

the City would give them time to do it; the City gave the Tugs 30 days to fix their pipes: the reason that the Tugs stopped at that time, was to show the people that they could not get along without them; no one opposes the ordinance now.

x78. How long did you refuse to run your Tug after the ordinance was passed?

Answer.—I kept on running and did not stop my boat; they could not compel me to stop on account of the height
84 of my carpenter's work.

x79. Is not the River generally very much crowded with vessels?

Answer.—It is generally; a good many vessels in it; at some places it is crowded with vessels, and at others not.

x80. Suppose the River were as wide again as it is, would the Bridges be so serious an obstruction to navigation as they now are?

Answer.—Yes sir; I should think they would, just as bad.

x81. Do not vessels often come in collision with each other?

Answer.—Yes sir, they do in the River.

85 x82. Which are most frequent, collisions between vessels, or collisions with the Bridges?

Answer.—I could not tell exactly.

x83. Suppose the draws of the Bridges were 30 feet wider than they are would they not be much less injurious to navigation.

Answer.—They would be less, of course, the wider they are.

x84. Suppose a Bridge with two draws of 110 feet each, to cross a River with a current directly through the draw, at the rate of from two to four miles an hour with less than a hundred vessels to pass it a day, would it be as much of
86 an obstruction to navigation as each of the Chicago Bridges is?

Question objected to by Complainant as immaterial and incompetent.

Answer.—I don't think it would be as much of an obstruction as each of the Chicago Bridges are.

x85. Would you regard a Bridge under those circumstances, as any serious obstruction to the navigation?

Question objected to by Complainant, and question waived by Defendants.

x86. Is there not at all times, when the wind is strong from the north a considerable current in the Chicago River?

87 *Answer.*—When the wind is from the northward the wa-

ter is generally a little higher without much current; there is hardly a day but what we have a little, but it does not show much; we have no regular current in the River.

Cross-Examination closed.

Re-Examined.

Re1. Where do these jams of vessels of which you have spoken, most frequently occur, at the Bridges or at other parts of the River?

Answer.—Well, we have a great many at the Bridges, and at other parts of the River, by vessels winding and 88
vessels hauling across the Creek.

Re2. At which of the places are they the most frequent?

Answer.—Well, it is a pretty hard matter to tell exactly.

Re3. Have you ever kept an account of the number of detentions caused you by these Bridges, or the number of collisions your Tug or her tows have had with the Bridges, or charged your mind particularly with that subject?

Answer.—I have never kept an account of the number of detentions caused me by these Bridges. I have never kept an account of the number of collisions my Tug or her 89
tows have had with these Bridges, nor have I ever charged my mind particularly with that subject.

Re4. Have such collisions and detentions been frequent, or otherwise?

Question objected to by Defendants as leading.

Answer.—Yes sir, we frequently have them.

Re5. How frequently have such collisions and detentions taken place?

Answer.—I don't think there is a day hardly, but what some of the Tugs having tows are detained; some one of the Tugs, not all. With reference to my own, I might be 90
detained two or three times a day, and then again I might not be detained at all. There are a great many times I have been detained that I can't remember particularly; it is something that I don't trouble my mind with, and the same with regard to collisions.

Re-Cross-Examined.

Re-x1. Who is liable for damages or unreasonable detention by the Bridges?

Answer.—I don't know, it has never been decided yet. There is a man here who has a suit against the Rail Road Bridge for detention, and another against the City for the 91
Bridge not being wide enough to pass a Steamboat.

Re-x2. Who paid the damages to the Wells Street Bridge that you spoke of?

Answer.—The City paid that themselves; I know the Captain asked me who was liable; and I told him not to pay it.

Re-x3. Where do these collisions that you spoke of occur?

Answer.—A great many times in the Bridges, you see we have to take one side, and we often meet in the Bridge, when there was a bend ahead and we could not see one
92 another, and get so close to one another before we see each other that we have no time to stop before we collide.

Re-x4. Do not most of these collisions occur at those Bridges which are situated on bends of the River?

Answer.—Well, I don't know as the most of them do; there are some of these float Bridges at which they occur, where both vessels have got to pass at the same time, and there is no room to steer.

Re-x5. Do not the most of them occur at the float Bridges and at those Bridges which are situated in bends of the River?

93 *Answer.*—Well, the most of them are at the float Bridges, because we have not many of the other Bridges.

Re-x6. Are there many collisions at the best constructed pivot Bridges, situated where the River is straight?

Answer.—No sir, we have but three where the River is straight, and do not have as many as at some of the others.

Re-x7. Did you not omit to keep an account and bear in mind the detentions you have suffered, because they were of slight importance?

Answer.—Yes, because they were of slight importance.

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Examination in Chief.

1. In case a vessel was being towed by you, and come in collision with the Bridge, is it your practice to pay the damage, or does that falll on the vessel injured, in case you were not in fault.

Question objected to by Defendant as leading and incompetent.

Answer.—If the neglect was in the vessel she would have to pay her own damage.

WM. A. McPHERSON.

Sworn before me this 17th day of December, A. D., 1857.

JNO. W. MAGILL,
United States Commissioner,
95 *Northern District of Illinois.*

1. State your name, age, occupation and residence.

Answer.—My name is WILLIAM N. BURTON, I am 40 years of age; I am engaged in running Tugs on the River and wrecking on the Lake; I reside at Kenosha, Wisconsin.

2. Have you ever navigated the Chicago River, if yea, for how long and in what kind of vessels?

Answer.—I have, with Tugs; for about four years last past.

3. In what business have your Tugs been employed during that time?

Answer.—In towing vessels and Canal Boats. 96

4. Are you acquainted with the Bridges over the Chicago River, and their manner of operation?

Answer.—I am.

5. How frequently have you had occasion in your business with Tugs or tows, to pass these Bridges?

Answer.—Sometimes every five minutes, and sometimes every ten, depending on the amount of work to be done; sometimes every hour.

6. What in your judgment is the effect of these Bridges upon the navigation of the River, injurious or otherwise; and if injurious, to what extent?

Answer.—They are injurious; they are a very great 97 injury.

7. In what does such injury consist?

Answer.—Detention to Tugs and vessels in River navigation, and causing a great deal of damage by vessels getting in a jam.

8. How frequent are these detentions and injuries?

Answer.—Well, they are a daily occurrence.

9. Describe the Chicago River as to its formation and currents, if it has any.

Answer.—It is a very crooked sluggish stream; the current as often runs up, as down, being caused by the 98 direction of the wind.

WM. N. BURTON.

Direct Examination closed.

Cross-Examined.

x1. How long have you resided in Kenosha?

Answer.—One year.

x2. Where did you move from?

Answer.—Chicago.

x3. How long did you reside in Chicago?

Answer.—Twenty years.

x4. In what capacity do you run Tugs? 99

Answer.—As owner and Master.

x5. What Tug do you run now.

Answer.—The Tarlton Jones.

x6. How long have you owned her?

Answer.—One year.

x7. How many other Tugs have you owned; state their names.

Answer.—I have had an interest in three; the Frederick Follett, Franklin and the Kossuth.

100 x8. Have you during the last four years run a Tug as Captain, if not, state what portion of the time you have?

Answer.—Well, I have been on the boats all the time during the last four years, except three months of the time that I was East; I had a Captain on my boats during all this time; but generally one or the other of them was off his boat, from sickness, or some other cause, and then I run his boat as Captain.

x9. How many times on an average has your Tug passed through the Chicago Bridges daily, during the last four years.

Answer.—Well, 150 times a day; I mean the different Bridges; I don't mean all of them; well there's eleven Bridges to be gone through, on the South Branch; to take 101 a vessel up past Old Street, and coming back, would make 22 times of passing to get back to the Pier.

x10. How many Tugs have you had running at the same time and for what length of time.

Answer.—I had two the first season that I went into it; that was in 1853; in 1854 I had three, and in 1855 three also; in 1856 I did not run a Tug directly; I was interested in them however; I was east part of the Summer with my family.

x11. How many times did each of your Tugs pass the Chicago Bridges, daily, on an average?

102 *Answer.*—I could not answer that question; each did not pass about alike, for the reason that one was running in the Bridgeport trade, towing Canal boats, and above the Bridges.

x12. State as near as you can.

Answer.—Well, in the season of 1853, 1854, and 1855, from 50 to 100 times a day; then there were but five or six Bridges up the South Branch from the Main Channel.

x13, What damages have your Tugs or the vessels they were towing, suffered in consequence of the Bridges; describe each case particularly, and state at what Bridge 103 the injury occurred?

Answer.—I can't state all the cases particularly, for it would take two weeks to do so.

x14. State all the cases?

Answer.—Well, my answers will be lengthly, if I have to explain every thing: I can't give dates without going to my books, and get my bills of damages, that I have paid.

x15. Do your books show those damages?

Answer.—They do to a certain extent.

x16. To what extent?

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Answer.—Well sir, I could not tell: I can give the reason why I can't tell, if necessary. We got our repairs done at one place, and the bills came in monthly; in this way, the bills for different work all got mixed up together, so that I could not tell.

x17. Where did you get your repairs done?

Answer.—At Doolittle & Miller's, Olcott & Jordon's, and Judd & Hewett's.

x18. Where are your books?

Answer.—I do not know.

x19. Where are your bills for these repairs?

Answer.—I do not know.

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x20. When did you see the books last, which contain an account of these repairs?

Answer.—Two years last October for the first three boats.

x21. When did you see the books last, which contained an account of the repairs on the boat you run last season?

Answer.—I saw them yesterday.

x22. Where did you see them?

Answer.—On board the boat.

x23. Have you any doubt they are there now?

Answer.—I have not.

x24. In answer to the question, where the books were, why did you say you did not know?

Answer.—My book-keeper took them to Detroit?

x25. When did he take them to Detroit?

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Answer.—I do not know.

x26. What was the book-keeper's name?

Answer.—Sheldon,—I think it was R. S. Sheldon.

x27. Where does he reside?

Answer.—At Detroit.

x28. Why did he take them to Detroit?

Answer.—Mr. Graves, a man interested in the boats with me, lives there, and he took them there to show Graves.

x29. How do you know he took them there for that purpose?

Answer.—All I know about it is, that it is very natural that a man should know what business he is doing.

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x30 Is that the only reason?

Answer.—I don't know of any other.

x31. When did he take them to Detroit?

Answer.—I don't know.

x32. Will you swear that he ever took them there?

Answer.—All I know, is what he told me himself.

x33. What did he tell you, and when did he tell you?

Answer.—I can't tell to save my life. I could tell by looking up dates. I can explain: I was gone during the
108 winter in Iowa; Mr. Sheldon took the books and settled up, and sold the boats.

x34. Which winter was you in Iowa?

Answer.—The winter of 1855.

x35. How would dates aid you in ascertaining what Sheldon told you?

Answer.—In reference to some uncollected tow bills.

x36. Is that the only way in which dates would aid you?

Answer.—It was in regard to a suit I commenced against the city; I wanted to see the books to get dates; he told
109 me they were in Detroit; I then had to go to Judd & Hewett's to get the dates, as they had done the work.

x37. When did Sheldon tell you that the books were in Detroit?

Answer.—Sometime during the summer of 1856, during the fore part of the season.

x38. Had you then commenced your suit against the city?

Answer.—No sir.

x39. When did you commence it, and what was it for?

Answer.—I commenced it in the summer or spring of 1856. It was for sinking the Tug boat Franklin, in Ran-
110 dolph Street Bridge.

x40. Has that suit been decided?

Answer.—It has.

x41. When?

Answer.—Two weeks ago to-day.

x42. What was the decision?

Answer.—I got Judgment for $300.

x43. Was that as much as you claimed, and if not, how much did you claim?

Answer.—I claimed $500.

x44. Will you describe how the Franklin came to be sunk?

Answer.—By striking a pile in Randolph Street Bridge; the pile was in the River, and had been sawed off some 5
111 feet under water, by the Superintendent of the City.

x45. How was the pile situated in reference to the Bridge?

Answer.—It stood from six to eight feet from the West abutment.

x46. Was the pile any part of the Bridge?

Answer.—It was of the old Bridge, but not of the Bridge then over the River.

x47. What hit it, the Tug or the vessel you was towing?

Answer.—The Tug.

x48. How was the Tug injured? 112

Answer.—It knocked a hole in her larboard bilge, by which she filled with water, and sank in about 5 minutes.

x49. Which way were you going?

Answer.—Down the River.

x50. What were you towing?

Answer.—Not any thing.

x51. Did your Tug on this occasion hit any part of the Bridge then across the River?

Answer.—No sir.

x52. Describe any other damage you have suffered by the Bridges?

Answer.—Well, I got damaged in Clark Street Bridge to the amount of $300 one time; it was the Tug Follett in November, 1854; the damage was caused by the carelessness of the Bridge tender, in not opening the Bridge in the night; he was not on the Bridge; the whistle was blown; I do not know where the Bridge tender was; I was towing the Brig H. R. Seymour up the River after dark; I could not tell whether the Bridge was open or not; the Tug got into the Bridge, and fetched up,—and the vessel came into the Tug, and knocked my Pilot House, Smoke Pipe and Trunk of Cabin off, broke in the rail and stanchions all on one side; it took three days to repair her; I did not bring any action against the City for the damage. 113

x53. Who paid the damage and how much was paid? 114

Answer.—We paid it ourselves; it cost somewhere between $250 and $300.

x54. Do you mean by your paying it yourselves that you paid it?

Answer.—Yes sir.

x55. Has the City or anybody paid you for these damages?

Answer.—No sir.

x56. Have you claimed pay of the City?

Answer.—Yes sir.

x57. On what ground does the City refuse to pay you? 115

Answer.—On the ground that I had no business to go through the Bridge unless they saw fit to let me.

x58. What reason is alleged on the part of the City that you have no right to go through the Bridges unless they see fit to let you?

116 *Answer.*—The City Superintendent, Mr. Harper, told me on the morning following the accident, that the City had passed an ordinance concerning Bridges, and that they had as much right in the River as vessels that navigated up and down; he also said that I must lay and wait for Bridges; that I had no right to pass, unless they chose to open the Bridge and let us through.

x59. Did you yield to the correctness of the position taken by the City?

117 *Answer.*—I went to the Chairman of the Committee on Harbor and Bridges, Mr. Granger, he told me when I got my bills of repairs he would take them before the Council, together with the bills for sinking the Franklin, and have them audited and paid; the following day I had a little difficulty with him in regard to Clark Street Bridge, and the Committee reported adverse to paying my bills.

x60. On what ground did the report place the refusal to pay?

118 *Answer.*—In the case of the Franklin, Mr. Harper had a survey of Randolph Street Bridge made; he reported to the Committee that the pile did not stand in the channel of the River; in regard to the Follett they decided that Tugs and vessels must wait for the Bridges to open; that is what I was told by either Mr. Granger or Mr. Harper; I can't tell, it is so long ago; it was one of the City officials.

x61. Have you brought a suit for the injuries to the Follett?

Answer.—I have not.

x62. Why not?

119 *Answer.*—Well, one suit is as much as I want to spend time to attend to.

x63. Any other reasons?

Answer.—No sir.

x64. The Follett was injured eighteen months before the Franklin, why did you not sue for the injury to the Follett before you brought suit for the injury to the Franklin?

Answer.—They were both injured the same month, the Franklin was sunk before the Follett was injured.

x65. Why did you not include your claim for damages to the Follett, in your suit for injuries to the Franklin?

126 *Answer.*—Well I would have to commence two suits;

and I owned a larger interest in the Franklin than in the Follett.

x66. Did the same persons own both vessels?

Answer.—Yes.

x67. Describe any other injury which your Tugs or the vessels they were towing, have sustained at the Bridge?

Answer.—In towing the Barque Water Witch, this last season, through Rush Street Bridge, met the Schooner Lathrop, coming up in tow of a Tug, the Lathrop struck the stone abutment on the north side of the Bridge, which sheered her over into the Water Witch, and the Lathrop's anchor caught the lanyards of the mizzen rigging of the Water Witch, and pulled her mizzen mast over her stern, breaking it off close to the deck, the Barque had to discharge her cargo of wheat, and was detained here two weeks putting in a new mizzen mast. 121

x68. How much was the damage?

Answer.—It cost something over $600, so one of her owners told me.

x69. Who paid it? 122

Answer.—They paid it themselves, and libelled the Lathrop for $1,000.

x70. What became of the suit?

Answer.—It is still in Court.

x71. On what ground is it claimed that the Lathrop is liable?

Answer.—Her anchor done the damage: the owner of the Barque claimed that his anchor was not where he ought to have carried it, by the Harbor Ordinance.

x72. Was the anchor where it should be carried by the ordinance?

Answer.—It was.

x73. Has any claim been made against you for this damage?

Answer.—There has not. 123

x74. Has any claim been made against the City for it?

Answer.—Not that I know of.

x75. Why was there no claim made against the City, in the case of the Water Witch?

Question objected to by Complainant as immaterial.

Answer.—All I know is from the parties interested. I don't know why, except what Mr. Steele told me, that they were going to withdraw the suit, and sue the City.

x76. Was the Rush Street Bridge finished at the time of the accident to the Water Witch.

Answer.—It was not.

x77. In what state was it? 124

Answer.—The north abutment was some three feet out of water; the middle abutment was done and ready to receive the Bridge; and the south abutment was, the stone work.

x78. Was the Bridge on the centre pier at the time?

Answer.—I think they were setting up the Bridge at the time and getting their staging ready.

x79. Through which opening were you passing,—through the south or north opening?

Answer.—Through the north opening.

125 x80. Is it usual to pass through that opening?

Answer.—It is the only one you can get through with a loaded vessel.

x81. Was the north abutment built into the River, or o nthe side of the River?

Answer.—It was built into the River.

x82. Is that Bridge situated in a crooked part of the River?

Answer.—It is.

x83. If the Channel of the River had been straight, would the accident have been liable to occur?

126 *Answer.*—I think it would have made no difference in this case.

x84. Why?

Answer.—The Schooner Lathrop was towing up from the piers; she had not shifted her course when the accident occurred; she struck the north abutment with her starboard bow, that shot her across the channel into the Water Witch.

x85. Had she not then changed her course when the collision occurred?

Answer.—Not until she struck the abutment; she changed her course when she collided with the abutment.

127 x86. Was there any staging or other fixtures for raising the Bridge which were in the way, and made the channel narrower than it now is?

Answer.—Not any.

x87. What was the staging placed on?

Answer.—On the middle abutment.

x88. Could not the Lathrop have avoided the collision by changing her course?

Answer.—Not after she collided with the abutment; she could if she had altered her course before she struck the abutment.

x89. Did you discover any bad management on the part of the Lathrop, and if so, describe it?

128 *Answer.*—No I did not.

x90. Should she not have changed her course before she struck the abutment?

Answer.—Yes.

x91. If she had changed her course would she not have avoided the collision?

Answer.—I think she would.

x92. Do you not then think it was bad management in not changing her course so as to avoid the collision?

Answer.—If the Captain had known that there was an abutment there, it was bad management the way he steered his vessel; it was his first trip in the Spring and he was steering up near mid channel, the same as all vessels who came in and went out the year before. 129

x93. Was not the abutment in plain sight?

Answer.—The stone work was out of the water perhaps two feet; might have been more; might have been less; it was so the Captain could not see it, standing aft by the wheel.

x94. Was it dark or daylight?

Answer.—It was daylight.

x95. Was not the abutment in plain sight from the bow?

Answer.—It was. 130

x96. Was it not then on the whole bad management?

Answer.—I can not tell.

x97. What is your opinion about it?

Answer.—I have stated before, that if the Captain knew the abutment was there, it was bad management.

x98. What kind of a Bridge was there at Clark Street, at the time of the injury to the Follett?

Answer.—Turn table Bridge, built by Harper; I think it was; it is the same one that is there now.

x99. Were they making any repairs upon it?

Answer.—Not that I know of; it was in the night.

x100. In your suit against the City, did you not give any evidence in regard to the injuries to the Follett? 131

Answer.—Not any; her name was not mentioned.

x101. State any other instance of damage that you have sustained by the Bridges, in addition to the three you have already mentioned.

Answer.—I lost my Pilot House one day in Lake Street Bridge.

x102. When was it? and state all the particulars.

Answer.—It was during the season of 1855. I was towing a vessel up, they did not get the Bridge open in time, and keeping out of the way of the vessel, I tore the Pilot House out of her by catching in the Bridge. 132

x103. Why did they not get the Bridge open in time?

Answer.—I do not know.

x104. Is not Lake Street Bridge in a crooked part of the River?

Answer.—It is.

x105. How far off did you signal your wish to pass?

Answer.—After we got through Wells Street, just at the Bridge.

133 x106. What reason was given at the time for not opening the Bridge?

Answer.—I never enquired; I reported to the Harbor Master.

x109. Who was the Harbor Master, and who was the Bridge tender at the time?

Answer.—Joseph Napier was Harbor Master; I don't know who was Bridge Tender at the time.

x108. Did you never hear the Bridge Tender, or any one else, say why the Bridge was not open?

Answer.—I did not.

x109. What amount of damage did you sustain?

134 *Answer.*—I don't know what it did cost; we got joiners on board and fixed it while running.

x110. State as near as you can, the amount of damage according to your best judgment?

Answer.—A new Pilot House is worth a hundred dollars; I should say these repairs cost from $25 to $40.

x111. Did you not claim pay from the City for it?

Answer.—I did not.

x112. Why not?

Answer.—I thought it would cost more than it would come to, before I got it.

x113. Have you any doubt but that the City is liable for it?

135 *Answer.*—I have not.

x114. What vessel were you towing at the time?

Answer.—I don't remember her name.

x115. Is there any other reason than the one you have stated why you made no claim for pay?

Answer.—None other.

x116. State any other instance of damage?

Answer.—I have been catched in all the Bridges, more or less; I can't remember all the instances, and all the particulars.

x117. Can you remember any other besides those you have specified, if so, state any one of them?

136 *Answer.*—Yes, the Rail Road Bridge at Zinzie Street; there was a train of cars going across; vessel we had in

tow came into us, because we had to stop; broke our Engine House down and stove her stern in, and upper works about the stern.

x118. Is it customary to give a signal that a train is to pass the Bridge, if so, state what it is?

Answer.—Nothing that we can see from the River; they ring bells as the trains come along.

x119. What year and time of day did this accident occur?

Answer.—In 1857, along in the middle of the afternoon. 137

x120. Did you give a signal that you wished to pass the Bridge?

Answer.—Yes sir.

x121. What was it, and at what distance from the Bridge given?

Answer.—It was a whistle, and given some 300 yards from the Bridge.

x122. Did you hear the bell of the train, and if so, at what distance from the Bridge?

Answer.—I don't remember; the bells are ringing pretty near all the time.

x123. How far were you from the Bridge when you stopped. 138

Answer.—From 100 to 150 feet.

x124. How wide is the River there?

Answer.—About 125 feet.

x125. Why did you not turn out on one side?

Answer.—There was not room.

x126. What kind of a vessel was you towing?

Answer.—She was a small lumber vessel, and would carry from 60 to 70,000 feet of lumber; she was a sail vessel.

x127. Was there any body at her helm at the time?

Answer.—There was.

x128. How far behind your Tug was she when you stopped? 139

Answer.—About fifty feet.

x129. Suppose you had had her alongside, would the accident have been likely to happen?

Answer.—No sir.

x130. What was the amount of damage?

Answer.—From $40 to $50.

x131. Did you complain to the man at the vessels helm for not keeping out of the way?

Answer.—I did not.

x132. Could he not have kept out of your way? 140

Answer.—He could have kept out of the way if he had

known in time, that the Bridge would not be opened.

x133. Did he not know it as soon as you did?

Answer.—I don't know.

x134. Had he not the same opportunity to know as you had?

Answer.—He had.

x135. How long ought he to have known it before, to have kept out of your way?

Answer.—It depends altogether upon how smart his men
141 are; he would want to know it in time to run a line ashore with his boat.

x136. Did you make any claim against the city for this damage?

Answer.—I did not; the Bridge does not belong to the city.

x137. Did you make any claim against the Rail Road Company, or any body else for these damages, and if not, why did you not?

Answer.—I did not, for the reason that I could earn it in the time, I would lose trying to collect it.

x138. Did you ever ask any body to pay you?

Answer.—I did not.

x139. State any other instance of damage you have
142 sustained by the Bridges?

Answer.—At the Rail Road Bridge in the South Branch, towing the Barque E. C. L. Down, with the wind to the southward and westward, and blowing fresh, some of the gearing to the Bridge, I dont know what it was got out of order, so they could not open the Bridge; and to keep out of the way of the Barque we ran to the dock, split our stern; the Barque had to let go her anchor, and we were detained at the Bridge a half a day.

x140. What was the amount of damage?

Answer.—The amount of damage to the Tug, was $20
143 for repairing the stern.

x141. When was the accident?

Answer.—It was in September, 1857.

x142. Have you made any claim for damages, if not, why not?

Answer.—I have not, because of the cost and trouble of prosecuting; I reported that Bridge to the Harbor Master, and the excuse they made to him, was that the foundation of the centre pier had settled, so that it worked hard.

x143. How long was it before they got the draw open?

Answer.—Half an hour.

144 x144. How long before that, had you passed up through the same draw?

Answer.—About one hour.

x945. How long had the Bridge been out of order?

Answer.—It had been in bad order ever since it was built.

x146. How long was that?

Answer.—I think it was built a year ago last winter.

x147. What has been the difficulty with it; and why do you think it was out of order? 145

Answer.—From complaint of the tenders, vessels having almost invariably to stop for the Bridge to open. The man that tends told me that the foundation had settled, so that it bound at each end, and their hog chains were not sufficient; they have put a new set of hog chains in this Bridge the past season.

x148. State any other instance of injury.

Answer.—Well, I have been catched eight or ten times in Van Buren Street Bridge, which is a float Bridge, in very poor condition and has been so all the summer. 146

x149. Is that the reason why you have been caught in it?

Answer.—Not entirely, not all the reason.

x150. What other reason than the poor construction of the Bridge; is there any other reason?

Answer.—Yes, poor Bridge Tenders, no other.

x151. State any other injuries which you have sustained by the Bridges?

Answer.—'Twas towing the Schooner B. E. Eaton up the River, and she got into Randolph Street Bridge, carried away her flying jibboom, and all her head gear; that was from carelessness of the Bridge Tender. There was a vessel lying on the west side of the River below the Bridge, and the Tender undertook to open the Bridge and the west end came round, catched this vessel's davit, and the Bridge Tender had to turn it back, and swing it the other way, and before he could get it open, the Eaton had go into it; she let go her anchor, but it did not fetch her up; the wind was fresh from the northward. It occurred this fall. 147

x152. What bill of damages did you make out? 148

Answer.—The Captain gave me the bill after it was made out; it was either $34 or $44; it was made out against no one; it was the Ship Carpenter's bill, who done the work.

x153. To whom was the bill presented, if to any one?

Answer.—To the Harbor Master.

x154. Does he refuse to pay?

Answer.—I never have heard from the bill since I showed it to him; he told me that the Bridge Tender should pay the bill. The bill when paid would go to the vessel. 149

I don't know whether it has been paid or not.

x155. Was there any serious injury by the detentions at Van Buren Street Bridge?

150 *Answer.*—There was once this summer; it detained everything nearly a half a day.

x156. State the cause?

Answer.—The Tug Ward, was towing up the Schooner Meridian; she went into the Bridge and got on top of it, so that she had to be jerked off; tore all her head gear, head stays and bob chains out of her; she struck on the Bridge and they could not heave her off; I had to let go the vessel I had in tow, and go to work to get the Meridian off; after which, I had to pull the Bridge open.

x157. What was the difficulty about opening the 151 Bridge?

Answer.—It was in bad condition; it has been sunk two or three times this summer; I don't know but more; it has now gone altogether; the other injuries were not very serious, occurring from carelessness of Bridge Tenders, and the Bridge being out of repair; the Bridge is not over two or three feet above the water, and in passing, the Tugs and vessels, on account of its lowness in the water, run on to it, and would do it more damage than themselves; because of their upper works being over it; 152 but in damaging the Bridge, caused detention to themselves, thus preventing the Bridge from being opened.

x158. State any other instance of damage?

Answer.—I have stated all the freshest in my memory; I could not name any more just now, where I could remember the vessel.

x159. Can you now remember any other instance of damage to your Tug, or the vessel she was towing, than those you have stated?

Answer.—No, I can not.

x160. Have you suffered any material detentions by 153 the Bridges, other than those which have occurred at the time of the accidents, to which you have referred, and if so, state them particularly, and their cause?

Answer.—I have; I was detained at Lake Street Bridge the most of one night, coming down with a vessel; this is a pivot Bridge; it was about six o'clock in the evening; they were hauling a Rail Road freight car across, which broke through the Bridge; and kept us along about 12 or 1 o'clock through the night; I don't know what time; it was near day light when we got through with our tow 154 and got back into the River again; this was in the summer of 1854; it is not a Rail Road Bridge; it is a com-

mon highway Bridge; there is no Rail Road track across it; I don't remember any other instance of detention, where I could give the particulars and the name of the vessel.

x161. Do you remember any other instance of detention than those you have specified; if so, state the same. 155

Answer.—I knew another instance at Lake Street Bridge; I could not tell the name of the vessel.

x162. Describe the detention, and the cause of it?

Answer.—It was caused by a propeller, lying at Ball's Elevator, or Johnston's dock, rather right south of the Bridge, and a vessel on the west side of the River was lying so that the Bridge could not open either way.

x163. Was it your Tug that was detained in this instance?

Answer.—I had three Tugs detained there at that time; for the most of one day, every Tug in the River was there and they all had tows. 156

x164. How long ago was this?

Answer.—This was the summer of 1855.

x165. Why were not those vessels moved out of the way, so that the Bridge could be opened?

Answer.—I don't know, that is the Harbor Master's business.

x166. What was said to be the reason at the time?

Answer.—Each vessel was lying at its own dock; they thought they had as good a right to lay at their dock and take in cargo, as the City to put the Bridge there; they were stubborn on both sides; they would not either of them move, until the Harbor Master obliged them. 157

x167. What was the width of the River there?

Answer.—From 150 to 175 feet above the Bridge, below the Bridge in the forks or the junction of the North and South Branches and the main River is quite a basin; I don't know how wide it is.

x168. Were these vessels wider than the abutments of the Bridge at each end, and if not, why did they lap on to the draw so that it could not be opened? 158

Answer.—They did not lap on to the draw, they were above the abutments, and so close to the abutment without touching the Bridge, that when the Bridge swung, one end would strike the bow of the propeller, which prevented its being turned in her direction; and swinging it in the other direction, it came in contact with the stern of the vessel, which prevented it turning there; these abutments were verry narrow, so that the vessel lying near them on either side extended out into the River more than 159

the abutments, and occupied the space required by the draw to turn.

x169. What is the width of the openings in Lake Street Bridge?

Answer.—Well, they are not far from 65 feet each, they may be seventy, and may be less than 65 feet, I never measured them.

160 x170. Do you remember any other instance of detention, if so, describe it and the cause?

Answer.—I do, at Madison Street Bridge, when they were building it during this summer, in putting in the centre Pier, they built a coffer dam around it, they throwed in so much clay from scows that the loaded vessels drawing 10½ feet of water could not pass through. The Barque Jesse Hoyt was towing down from Flint & Wheeler's, fetched up at Madison Street Bridge, and stopped navigation all of half a day; there was some 15 or 20 detained above and below; this detained vessels some ten
161 different times, and stopped navigation altogether, until it was dredged out; at one time there were six Tugs at one vessel to pull her through.

Adjourned by agreement, to to-morrow morning, at nine A. M., Dec. 18th, 1857.

JNO. W. MAGILL,
United States Commissioner,
Northern District of Illinois.

Saturday, Dec. 19th, 1857, }
Nine A. M. }

Solicitors for parties and witness present.

Cross-Examination continued.

x171. State any other detentions occasioned by the Bridges.

162 *Answer.*—In towing the Schooner Ocean down the last of September, they could not open Van Buren Street Bridge; the vessel run into the Tug, and shoved the engine house forward, breaking the deck fastenings, and detained us from one to two hours.

x172. Why could they not open the Bridge?

Answer.—The Tender said the gearing was out of order.

x173. Was that a float Bridge?

Answer.—It was.

x174. State any other incidents of detention.

Answer.—In towing the Schooner Forfair up the River. Kinzie Street Bridge got jammed; a spar had floated
163 among the protection piles of the Bridge, and prevented the Tender from opening it; the vessel had to let go her

anchor, and we were detained about an hour; well, I was detained at Van Buren Street Bridge, by the Chain getting foul of the propelling wheel; this was last October; the Chain by which the Bridge is opened; it lays on the bottom of the River; we had not got through the Bridge, but was just clearing it when she caught the chain; it detained us about two hours; in going up in the month of September last, after the Schooner William Cass, about ten o'clock at night; Van Buren Street Bridge had no Tenders on it, and we had to get on the Bridge and open it ourselves; that detained us half an hour; we then went along up to Twelfth Street, and found it without Tenders; in opening that I parted its chain; we were here detained about half an hour; we then got to the Rail Road Bridge, and a man having been killed on that Bridge, the Tender refused to open it; this detained us about an hour; we then made Old Street Bridge, and the same thing occurred there, as at Twelfth and Van Buren, detaining us about half an hour; Twelfth and Old Street Bridges are float Bridges. 164 165

The man injured on the Rail Road Bridge, had been run over by the Locomotive, just before we came up and was then lying on the Bridge in a dying condition; he died before I returned from Old Street Bridge; the time of night was after the usual hour for Tugs to go up the River for vessels.

x175. Was this the reason that the Bridge Tenders were absent?

Answer.—I don't know.

x176. State any other instances of detention. 166

Answer.—I was towing the Schooner Aldebaran down the River in the month of July last, and in the Rail Road Bridge in the South Branch, we met a Canada Barque; the Barque got a line out to stop her headway, and the men on the vessel that the line was made fast to, cast it off; thus letting the Barque range ahead, and the vessels came together in the Bridge, damaging the Barque's head gear, and carried away the Aldebaran's main standing rigging on her larboard side; we were detained two hours. 167

We were towing down the Barque J. S. Pomeroy; he had to let go his anchor at Van Buren Street Bridge, on account of getting the Bridge open; it detained us an hour; there was some vessel below the Bridge that was the cause of it; the abutment being so short, that vessels lying close to it, prevent its being fully opened; that was the case in this instance. The same thing occurred when we got to Lake Street; she had to let go her anchor which 168

detained us about an hour; I can't tell the cause of their not opening the Bridge; this was about the last of September of this year. In September last I was coming with some lumber vessel, and the Propeller St. Nicholas, was foul in the West draw of Lake Street Bridge, and the Brig Canopis got foul of the Propeller in winding; neither of them would back out, and we were detained
169 there from two to three hours; the East opening was jammed by vessels, and the West opening by the Propeller; and two vessels, preventing the Bridge from opening; nothing was done until the Harbor Master came; who caused them to be moved out of the way; and fined the Captain of the Brig $25; there were two Tugs with tows of vessels, one going up and the other down, in the East opening; it is very difficult for vessels to pass at the same time, through the same opening; because there is not
170 sufficient room to steer, and deep clear of each other and the abutments of the Bridge; the vessels being generally from 28 to 30 feet beam; the draws of the Bridges from 65 to 75 feet. In the last of July, or first of August, I was towing the Barque De Soto; she struck the middle abutment of Lake Street Bridge, which gave her a sheer, so that she struck the lower abutment; pulled over some of the protection piers and carried away all his head gear; in striking those spring piles with her Starboard bow; it gave her a sheer for the point at the junction where she
171 grounded on the mud and lay there all night; we tow with tow lines and the line from her larboard bow parted after striking the spring pile and she then went into the mud.

x177. Was any body at the helm of the Braque?

Answer.—There was at the wheel.

x178. Could the vessel have avoided hitting the centre pier by good management?

Answer.—There was two vessels lay abreast on the East side of the River, which did'nt leave room to fetch the Barque through the last draw of Randolph Street
172 Bridge, and we had therefore to take her through the West draw of Randolph Street Bridge, and the East draw of Lake Street Bridge; which did not leave more than ten feet to spare, between the abutment to Lake Street Bridge and the vessel laying at Lake Street; on the South side of Lake Street, and the East side of the River; she was managed as well as she could be under the circumstances.

x179. State any other instance of delays.

173 *Answer.*—In towing up the Schooner George F. Foster, this month, (December;) they did not get Lake Street Bridge open, and the vessel went into the Birdge; carried

away her bowsprit, flying jibboom, and broke one of the hog chains to the Bridge; we were detained there an hour perhaps; I don't know why they did not open it; I think that Bridge Tender said that the ice bothered him by getting on the wheels of the Bridge; in the month of October last, I was towing up the Schooners, H. Spencer and Mary Jane; we met the Tug Follett in Rush Street Bridge; the vessels I was towing fetched up against the abutment of the north opening, carried away their head gear and detained us two hours; there were three or four other Tugs ahead of us with tows; the Follett in dodging to get clear of them, run into us and shoved us over into the spring piles of the North abutment and the vessels followed us; the wind blowing fresh from the Southward; the vessels drifted in on to the dock, and it took us some time to get out; they laying on top of us; as we were caught between the vessels head gear and the dock; on going up through the Rail Road Bridge, on the South Branch, in July or August, with four or five Canal Boats in tow, they were switching cars on the Rail Road Bridge, and would not open the Bridge; the Canal Boats came up into us; shoved us into the Bridge; detained us from one to two hours. 174 175

x180. Did you see that the Bridge was not opened before you came to it, and if so, how far off?

Answer.—I did, probably from three to four hundred yards from it, perhaps more; there is a bend in the River 300 or 400 yards below it, and one above it, about the same distance.

x181. Why did you not stop before you got in the Bridge, and is there a switch on the Bridge? 176

Answer.—I could not; I had four Canal Boats behind me; they were following right up; there is no switch on the Bridge; it is a single track; there are switches at each end of the Bridge; they run a train off and on five times while I lay there.

x182. Do they not make any signal of trains passing the Bridge?

Answer.—I never have seen any on the Bridge.

x183. State any other case of detention.

Answer.—In the Fall or Summer of 1854, towing a vessel down through Randolph Street Bridge, we fetched up between a pile and the west abutment; it was the same one that the Franklin ran into; we had to let go our vessel and get a Tug to pull us out; it detained us an hour and over. 177

x184. Did you know the pile was there?

Answer.—I did.

x185. How came you then to run on to it?

Answer.—We met a tow of Canal Boats in the Bridge; kept close to the abutment as we could to avoid them, and kept too close and thus got jammed between the pile and
178 the abutment.

x186. State any other cases of detention?

Answer.—In the month of October last, a tow of Canal Boats got jammed in Van Buren Street Bridge, and blocked up the River all of one day; there was some twenty-five vessels detained below the jam.

x187. What was the cause of their getting jammed in there?

Answer.—By vessels lying above and below the Bridge, so that they could not get the Bridge open.

x188. State any other cases of detention?

179 *Answer.*—In towing up the Schooner John Thursby, sometime in October, through Van Buren Street Bridge, they could not get the Bridge open sufficiently to let her clear a vessel, that lay above on the west side of the River, and carried away the Thursby's bowsprit, shrouds and head gear, and the cat-head of the Schooner Eagle Wing, that lay on the dock at the west side; the damage to the Eagle Wing was $14; the damage to the Thursby, was about the same amount; it detained us in the neighborhood of two hours; it was caused by a vessel lying on the
180 east side of the River, so the Bridge would not open more than half way, and the Thursby hit the Bridge, which gave her a sheer, and she went into the Eagle Wing. In September or October, I don't know which, of this year; I was towing a vessel loaded with coal, I don't remember her name; I was towing her from the north branch into the south, and we met a Canal Boat in the west draw of the Lake Street Bridge; the vessel struck the middle abutment lightly, which gave her a sheer, and her flange boom
181 bowsprit struck the spring piles, carrying away the dolphin striker, and all his head gear pretty much, except the bob stays; had to get another Tug with us to pull him out; we were detained over three hours; the Canal Boat was hauling up the River, as they generally do.

x189. Was the Canal Boat properly managed?

Answer.—I never saw one in the River, that I could say was; Canal Boats moving in the River, when not in tow of a Tug, either pole or drift with the wind or current; sometimes they run a line and haul along the dock, which
182 was the case in this instance, she was poling and shoving by the piles.

x190. Was the Canal Boat in her proper place?

Answer.—She was not.

x191. State wherein?

Answer.—Well, her bow was pointed to the southward and westward, and stern off in the stream, so that she took up probably two-thirds of the west draw of the bridge; I had to get the bow of the Tug against the Canal Boat's stern, abaft amidships, and shove her round; while doing so, the wind from the westward sagged the vessel over until she hit the middle abutment. 183

x192. State any other case of delay.

Answer.—In the fall of 1855, in the month of August or September, towing up the Barque Sonora, the Schooner N. C. Walton was coming down the River, we met in the east draw of Lake Street Bridge; the Walton hit the spring piles on the south side of the abutment, as we got into the draw with our vessel, carrying away the Walton's flying jibboom, most of her head gear, and injuring the Barque's light running rigging; the Walton was drifting down the River, with the wind to the southward, and would have gone clear, but for the spring piles and abutment.

x193. Describe what bad management there was on the part of the Walton? 184

Answer.—If she had got a line out to the dock, and stopped her, the accident would not have occurred; she had no canvas set; she was drifting down with the wind fresh from the southward and westward, and the Tug was in the draw of the Bridge; she was dragging along the dock on the east side of the draw, and as the Sonora entered the draw, the Walton struck the spring piles of the east abutment, and canted his bow athwart ships of the draw. We were detained two hours.

x194. Was not this accident owing to carelessness on the part of the Walton? 185

Answer.—I think it was.

x195. Describe any other detention.

Answer.—In September, 1855, I was towing down the Barque Black Warrior, the wind blowing heavy from the southward and westward, in passing through Well Street Bridge, we met a Canal Boat loaded with corn in the south draw; the Black Warrior collided with the Canal Boat, and the boat sunk in five minutes; we blowed our whistle for the Bridge to open as soon as we hove in sight of the Bridge; and when within fifty feet of the Bridge, I saw the Canal Boat with her bow lapped on to the spring piles of the south abutment, shoving out to get through the Bridge to go up; hailed him to hold on; he said he had 186

as good right to the River as any one; the Tug passed between him and the middle abutment; the Barque was from 50 to 60 feet astern in tow; she struck the Canal Boat bow, or in the Canal Boats larboard bow, and she sunk; it probably stove her in; we were not delayed at all.

x196. State whether the accident was not caused by
187 carelessness, on the part of the Canal Boat, and describe it?

Answer.—I think it was by his shoving out into the draw of the Bridge without a line out; there was about 20 feet between the bow of the Canal Boat and the centre pier, when the Black Warrior struck her; there was not room when they collided, for the Black Warrior to have passed between the centre pier and the Canal Boat.

x197. State any other?

Answer.—In the Fall of 1854, I was towing the Barque
188 Ocean Wave, through Clark Street Bridge, up; when we got near the Bridge, we met a vessel coming down, through each opening, or draw; the Captain of the Ocean Wave, thought there was no room to pass through after we came into the draw, and let go his anchor to stop his vessel; she ran on to her anchor and sunk at the lower end of the middle pier.

x198. Was there room for her to pass, or was he mis-
189 taken in supposing there was not room?

Answer.—If the vessels coming down the River, had each kept their own side, there would have been room; but it looked from the Tug as though there was not room.

x199. Did the vessels coming down keep on their proper side?

Answer.—They did not.

x200. Was not the accident owing to that fact?

Answer.—If the vessel coming down the North side of the Bridge, had kept to the South side of the Bridge, we could have passed up; there is no wrong side as far as
190 going up and down the River is concerned; the Tugs as a general thing, when they have vessels in tow, point for the best opening in the Bridges; the proper side of the River is actually the starboard, or right hand side; but very few Tugs or vessels, adhere to that rule; there is no ordinance that I have ever seen, that compels them to do so.

x201. State why the starboard side, is the proper side, for vessels to keep in, entering and going out of the River?

Answer.—I don't know of any other reason, except that
191 our Marine Law requires any two Steamers or vessels, in meeting, to take the starboard side; Steamers as well as

vessels, have or should have, their red, white or blue light, to show how they are sailing in the night, and they are required by law, to observe those lights, and to keep to the starboard of each other and so avoid collision; this rule however, is not carried out in the River; it never has been.

x202. State any other instances of detention?

Answer.—I don't recollect any more, where I could 192
state the particulars.

x203. Have you stated all the incidents of accidents and detentions that you now remember?

Answer.—I can remember another now, that just struck me; I don't recollect the name of the vessel; a Tug was towing a vessel, not my Tug, up through Madison Street Bridge; the Tug Follett was going down with the Schooner I. H. Drake; they met in the West opening of the Bridge; the Tug Kossuth was going down soon after, with 193
a tow of Canal Boats; she undertook to pass through the East passage of the Bridge; the Drake jammed in the West passage with the vessel bound up; the Tug Kossuth, got jammed in the East passage; I was following down with the Brig Saminaw, or Preble; I don't recollect which; but it detained us over two hours; I don't know which vessel was to blame for this detention.

x204. Was it not wrong for the Follett and the other Tug to attempt to pass through the West opening?

Answer.—One or the other of the vessels should have 194
got out a line; as there was but one opening for vessels drawing eight and a half feet of water, to pass through.

x205. Was not the accident then, owing to the fault of one or the other of the vessels?

Answer.—I can't answer that question.

x206. Is there but one opening in that Bridge, through which vessels drawing more than 8½ feet of water can pass?

Answer.—There is now; the City have dredged it out; 195
but there was not at this time, that I speak of; there was from 7 to 8 feet of water in the other passage.

x207. What was the cause of the Kossuth getting jammed in the east passage?

Answer.—She jammed between the middle pier and a Propeller lying at the American Transportation Company's Dock; the channel was too narrow, and the Propeller extended out into the stream beyond the abutment; the propeller lay on the east side of the River, and immediately below and adjoining the Bridge, and there was not room 196
between the centre pier and the Propeller, to let her pass

through, as she was clearing the draw; the draw was wide enough to pass her; if the Propeller had not laid there, she would have gone through. I was detained by this, two or three hours; this was in August last.

x208. Have you stated all the accidents or detentions, occasioned by the Bridges, which you now remember?

197 *Answer.*—I have.

x209. At what kind of Bridges do most of the accidents and detentions occur?

Answer.—Heretofore, they have occurred at float Bridges; as the most of the Bridges on the River were float Bridges; well, about the same number of accidents and detentions occur at pivot Bridges as at float Bridges; there did last year; this last season I mean. There has been more serious damage at Pivot Bridges than at Float Bridges.

x210. Have there been as many detentions and acci-
198 dents during the past season at Pivot Bridges, as at Float Bridges, in proportion to the number of each?

Answer.—I think there has.

x211. How many accidents and detentions have you known at Rush Street Bridge, since it was in operation?

Answer.—Vessels, in four or five instances, sailing up, got foul of the spring piles at the north abutment, and blocked up the opening; I don't recollect the names of the vessels.

199 x212. State the cause of their being blocked up?

Answer.—It is by their not having wind enough to keep steerage way; or, by the wind baffling and heading them off.

x213. Were these instances, all of them, when vessels were sailing up?

Answer.—Yes.

x214. Have you known of any more than the four or five instances you have named, of the vessels sailing up? if not, state how many more you have known, and the
200 cause?

Answer.—I have known of as many more sailing down; the cause, as a general thing, is from vessels not having wind enough to give them steerage way, the wind baffling so as to head them off.

x215. Have you known any instance of detention to Tugs, or vessels in tow of Tugs at Rush Street Bridge, since it was in operation; if so, describe them and their cause?

Answer.—I have; two vessels getting into the draw at the same time, getting foul of each other, and detaining
201 Tugs and Vessels above and below; they got too near to-

gether in going out and coming in; the narrowness of the channel compelling them to keep close. I can't state every instance and its particulars, that have occurred at this Bridge.

x216. Is not the Rush Street Bridge the best Bridge in the City, and does not all the commerce of the City have to pass it, except the Canal Boats?

Answer.—It is not the best Bridge in the City as it now is, neither does all the commerce pass through it.

x217. Why is it not the best Bridge?

202

Answer.—There is but one opening through which a vessel drawing nine feet of water can pass.

x218. What portion of the commerce of the City does not pass it?

Answer.—I can't answer that.

x219. You said all the commerce of the City, except the Canal Boats, does not pass it; what portion do you refer to that does not pass it?

Answer.—Well, there are five coal yards below Rush Street Bridge, that receive coal from Erie and Cleveland; four or five wood yards; two or three manufactories; iron for the different Rail Roads; and pretty much all the lumber for the Illinois Central, and the different Roads that lead out of that depot; all this is landed below Rush street Bridge.

203

x220. Does that embrace one quarter of the commerce of Chicago?

Answer.—I think not, of imports; of exports, I think it would embrace one-quarter of the exports; I may be mistaken, but I think one-quarter of the grain that leaves Chicago, is shipped from below Rush Street Bridge.

x221. Has the commerce of Chicago increased within the last five or six years, and if so, to what extent?

204

Answer.—I should think it had increased two thirds within the last five years.

x222. Has not the business of towing with Tugs, also increased, if so, how much?

Answer.—Five years ago there was but three Tugs, now there are sixteen or seventeen.

x223. Does not each one of the 16 or 17 do more business now than either of the three did five years ago?

Answer.—It does not, five years ago they got bigger prices; there was a line of Packets running on the Canal, which has since been hauled off, and the Canal towing has not increased in proportion to the vessel towing.

205

x224. How much have the prices of towing fallen during the last five years?

Answer.—Well, not very much; but it costs nearly double to run the boats now, that it did five years ago.

My attention being called to my answer, to Cross interrogatory 223; I find I have not answered it correctly; I thought the question had reference to the profit of the business, and not as to the amount of work done; my answer should be—They do.

206 On thinking of my answer to the 221 Cross Interrogatory; I should have said, trebled itself within the last five years.

x225. Is it not often the case that vessels are jammed in the River, at other places than the Bridges?

Answer.—It is.

x226. Do not collisions and detentions often occur at other places than the Bridges?

Answer.—They do.

x227. Do not most of the detentions at Bridges, occur in consequence of vessels disregarding the rule to keep to the right?

Answer.—I think not.

207 x228. Suppose Ferry Boats were used where Bridges are large enough to accommodate the traffic now passing over the Bridges, would they not cause a greater obstruction than the Bridges?

Answer.—That would depend altogether upon the man that had charge of the ferry.

x229. Suppose the Ferries were as well managed as the Bridges are, and no better?

Answer.—The Coroner would have plenty of business, and I think they would not cause a greater obstruction to the navigation; a Ferry line, or boat, would stop neither Tug nor vessel, whether they slacked the line down or not; 208 whereas a bridge stops everything.

x230. How frequent would collisions with ferry boats occur, if ferry boats were used to carry the traffic that now passes over the River?

Answer.—I can't answer.

x231. Would they not be likely to occur very frequently, and more so than collisions do now at the Bridges?

Answer.—Well, I think they would, but with less damage to shipping.

209 x232. Describe the South Branch of the River.

Answer.—From Lake to Maidson Street, I should say, the River was 250 feet wide; from there to Polk Street and a little above, to the Tannery Dock, it is from 175 to 200 feet wide; from there to Twelfth, from 225 to 250 feet wide; from Twelfth Street up to Hough's Packing

House; above all the Bridges it is from 150 to 175 feet; this however is all guess work, as I never measured it; it is a very crooked River.

x233. Have you heard of the ordinance requiring Tugs to have joints in their smoke pipes?

Answer.—I have.

x234. Were you one among the number of the owners of Tugs, who refused to comply with it? 210

Answer.—I was not.

x235. Were not your Tugs laid up and passage through the Bridges refused, for not complying with this ordinance?

Answer.—I had nothing to do with the Tugs at that time, whatever; I was not in town.

x236. When was the ordinance passed?

Answer.—I think it was in June or July, 1856; July I think.

x237. Had you no interest in Tugs at that time?

Answer.—No farther than getting pay for them; we had sold them the fall of 1855, to Nichols and Whitcomb. 211

x238. Have you or your Captains, had difficulty with the City in regard to passing Bridges, and if so, state what.

Answer.—I have had difficulties with the City authorities. I had trouble with Mr. Harper, when he was City Superintendent; and with Mr. Granger, when he was chairman of Committee on Harbor and Bridges, caused by my Tug, the Follett, opening Clark Street Bridge; I never had any trouble with those parties otherwise.

x239. How was Clark Street Bridge opened by the Follett, and what was the reason for it? 212

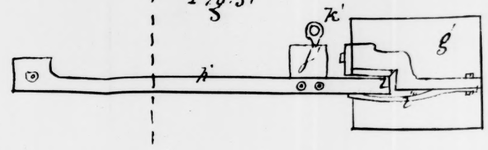
Answer.—Mr. Harper, the Superintendent, told me the morning after the day I opened it, that no Tug or Vessel had any right to go through the Bridges without he chose to let them; and if they came up to a Bridge, and the Bridge-Tender did not open it, they must wait until he did. I came down the River in the afternoon of the same day to Wells Street Bridge, blowed our whistle; the Bridge did not open; ran down to Clark Street, until the bow of the Tug lapped on to the middle abutment of the Bridge, hailed the Bridge Tender; after waiting some ten minutes, asked him if he was going to open the Bridge, he replied, when he got ready, or words to that effect; I rung the bell to go a-head, and we went through the Bridge. Mr. Granger sat in his buggy on the south abutment of the Bridge, and ordered the Harbor Master to arrest me. 213

x240. Did you break any part the Bridge at that time?

No 228 — Wheeler & Wilson's Manufg Co

Cortes —

Fig: 5.



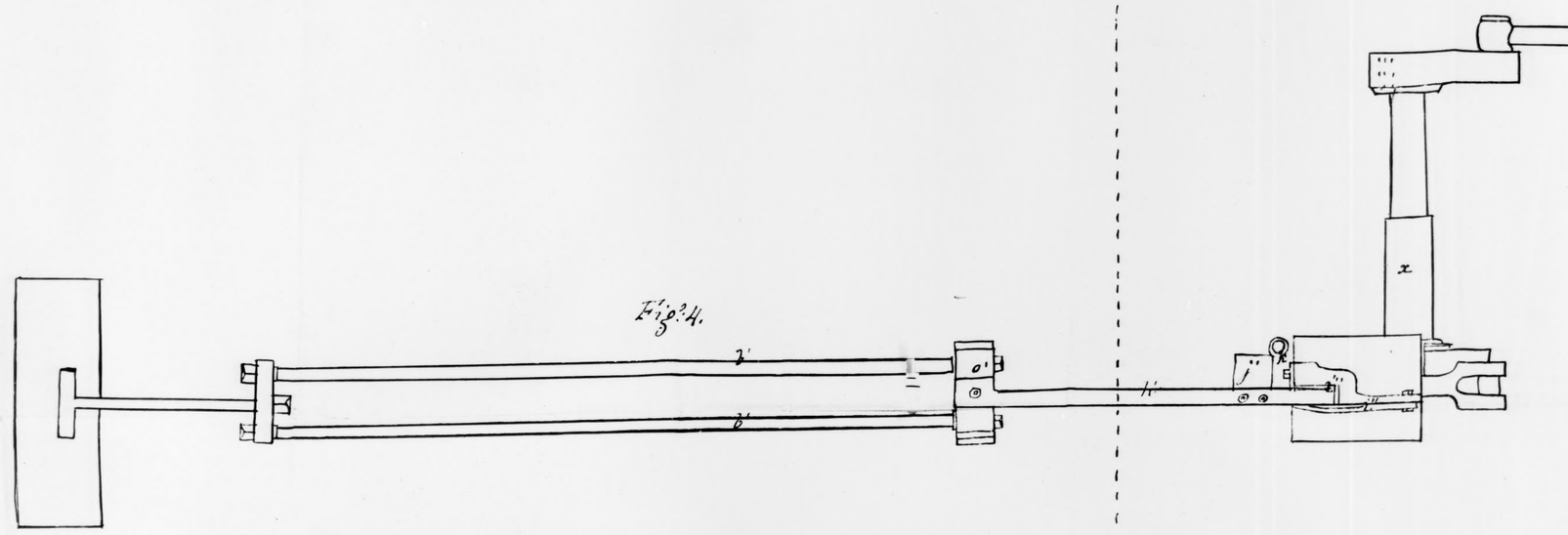


Fig: 3

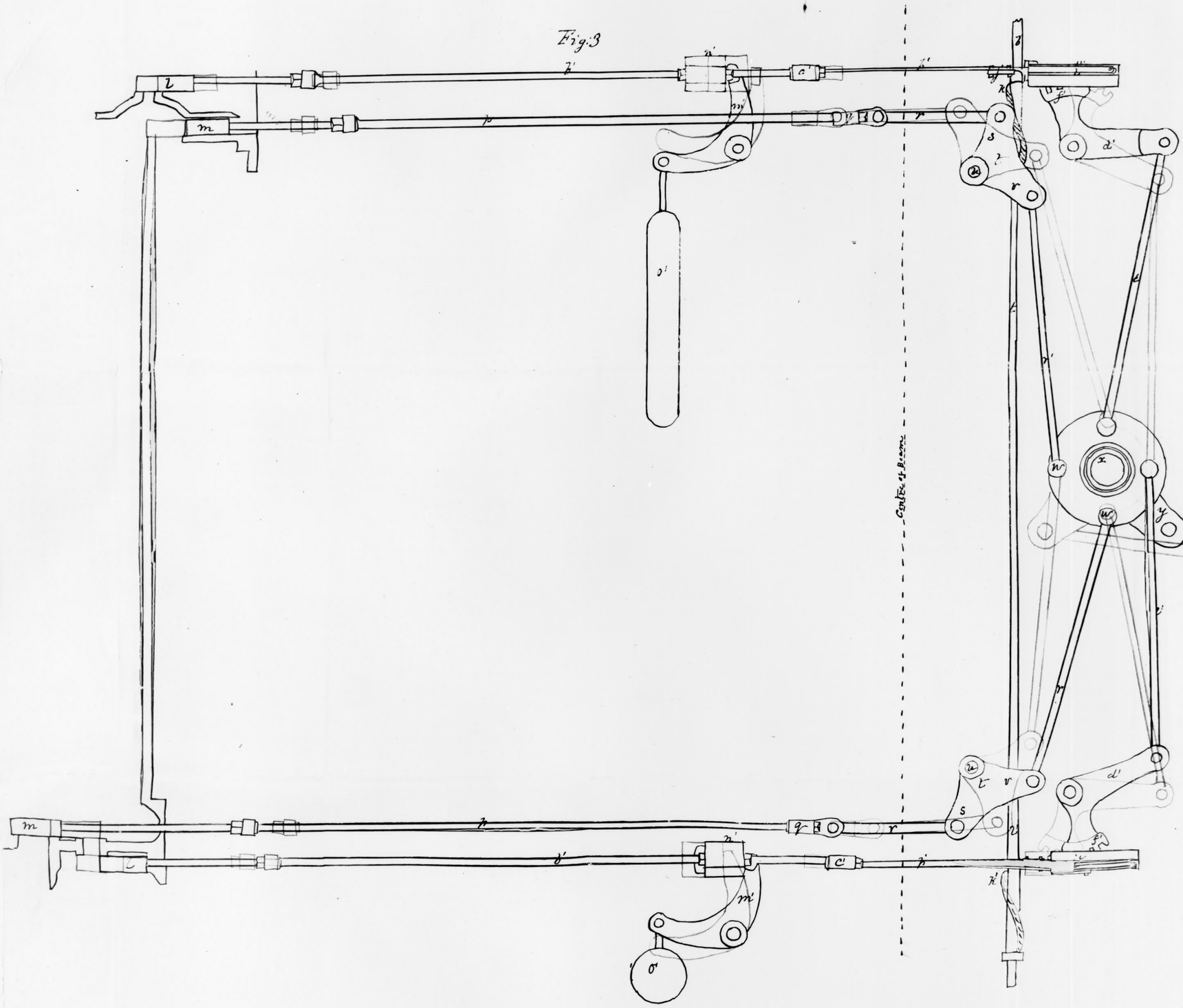
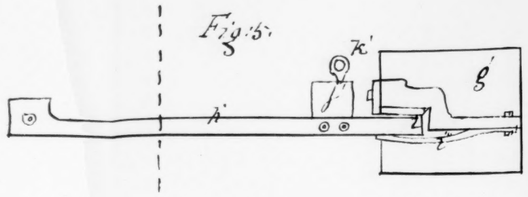
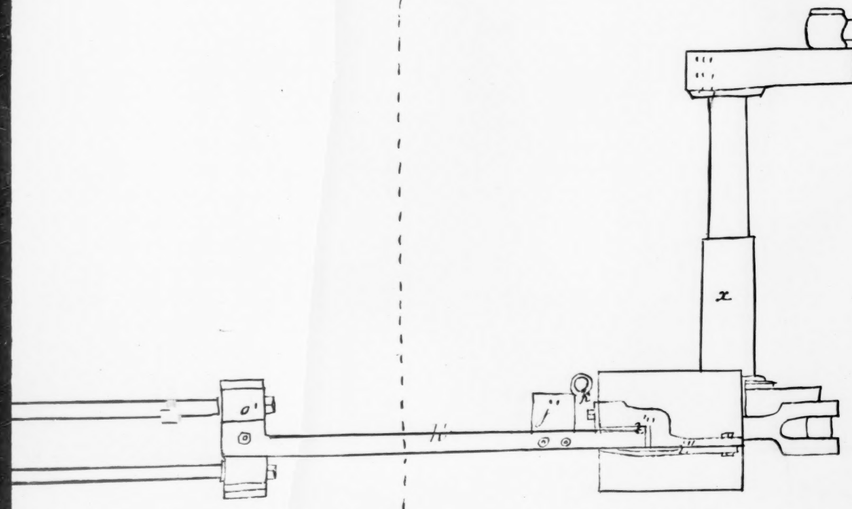


Fig. 5.





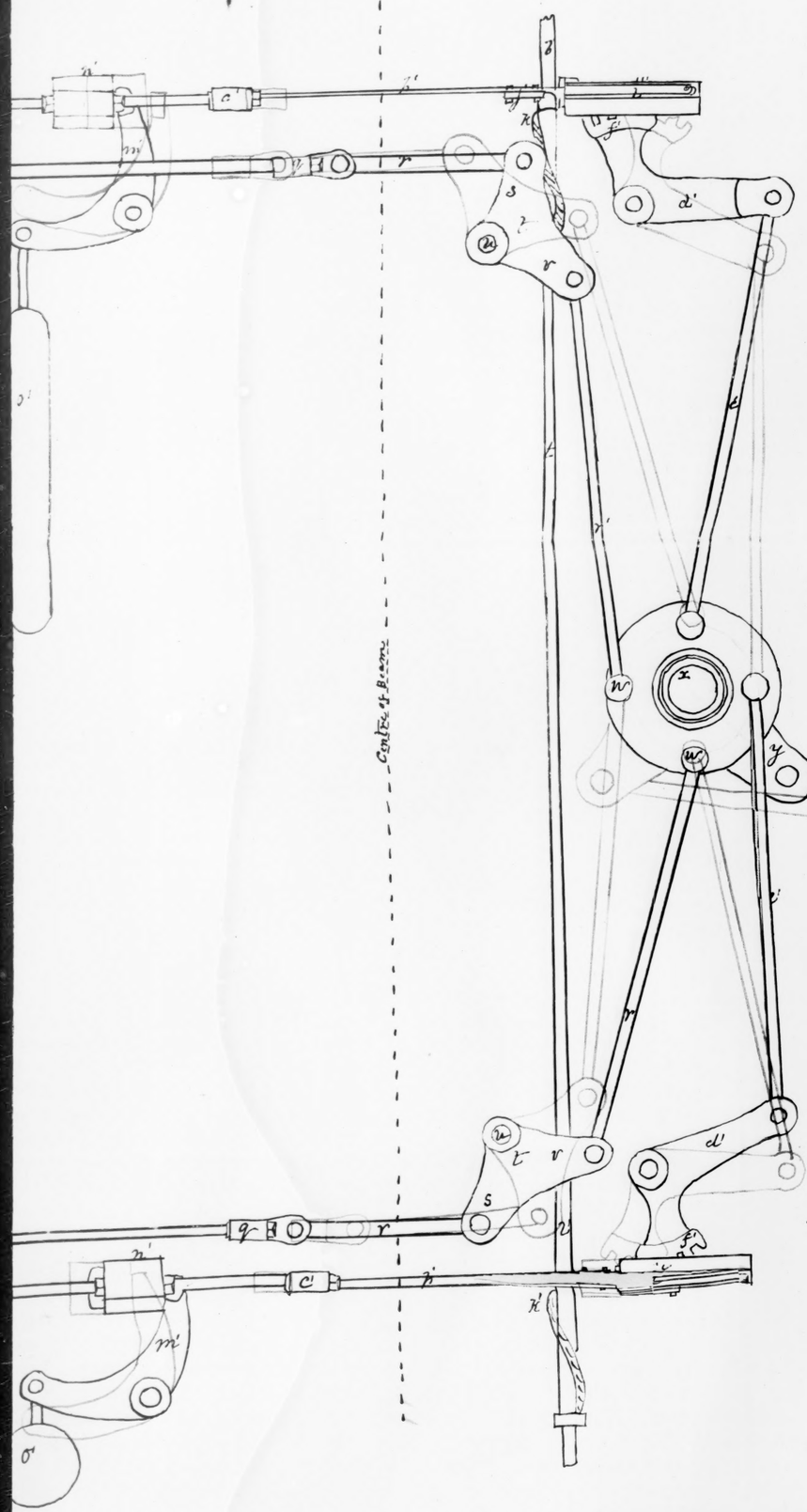


Fig. 6.

Fig. 7.

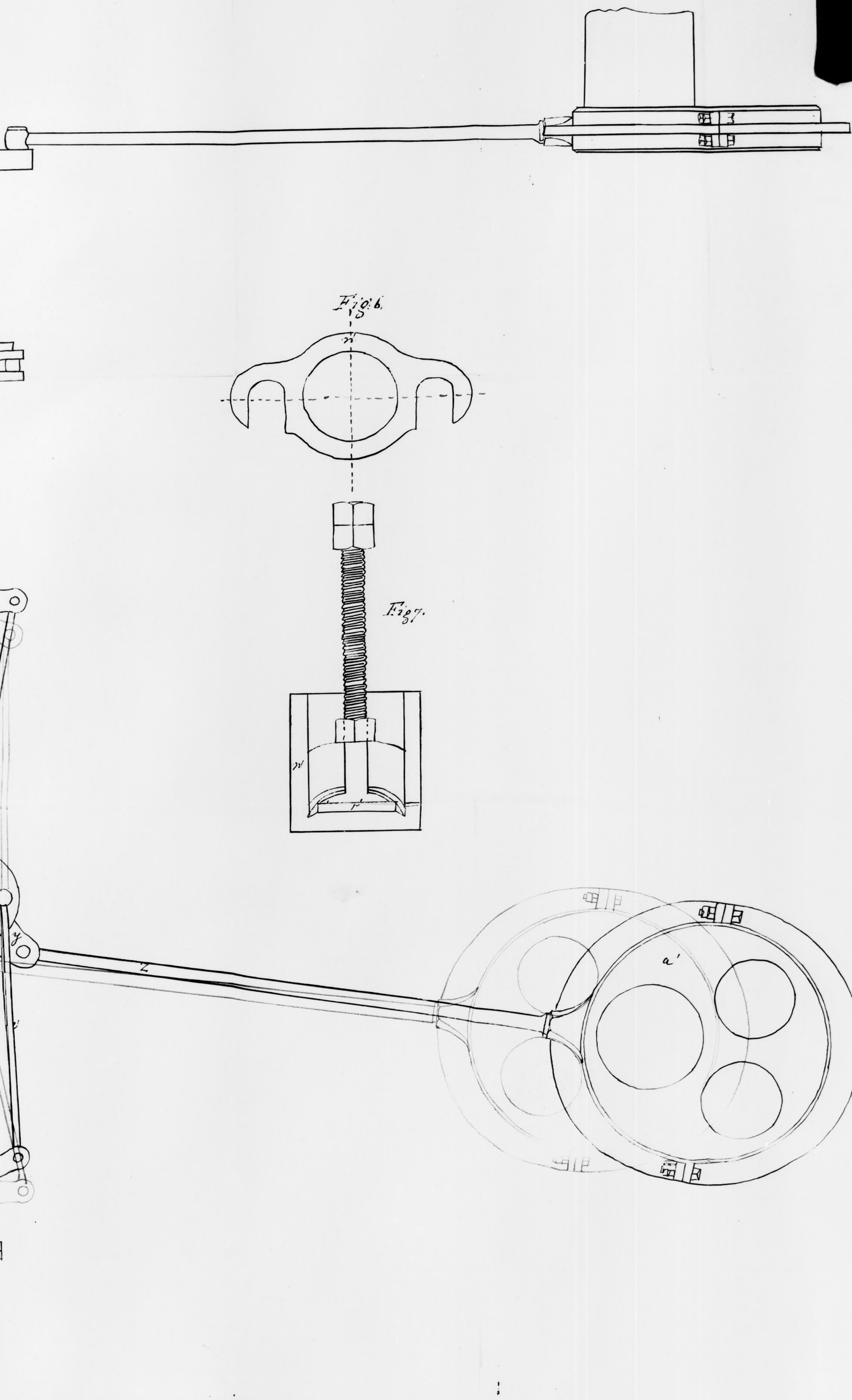


Fig: 1

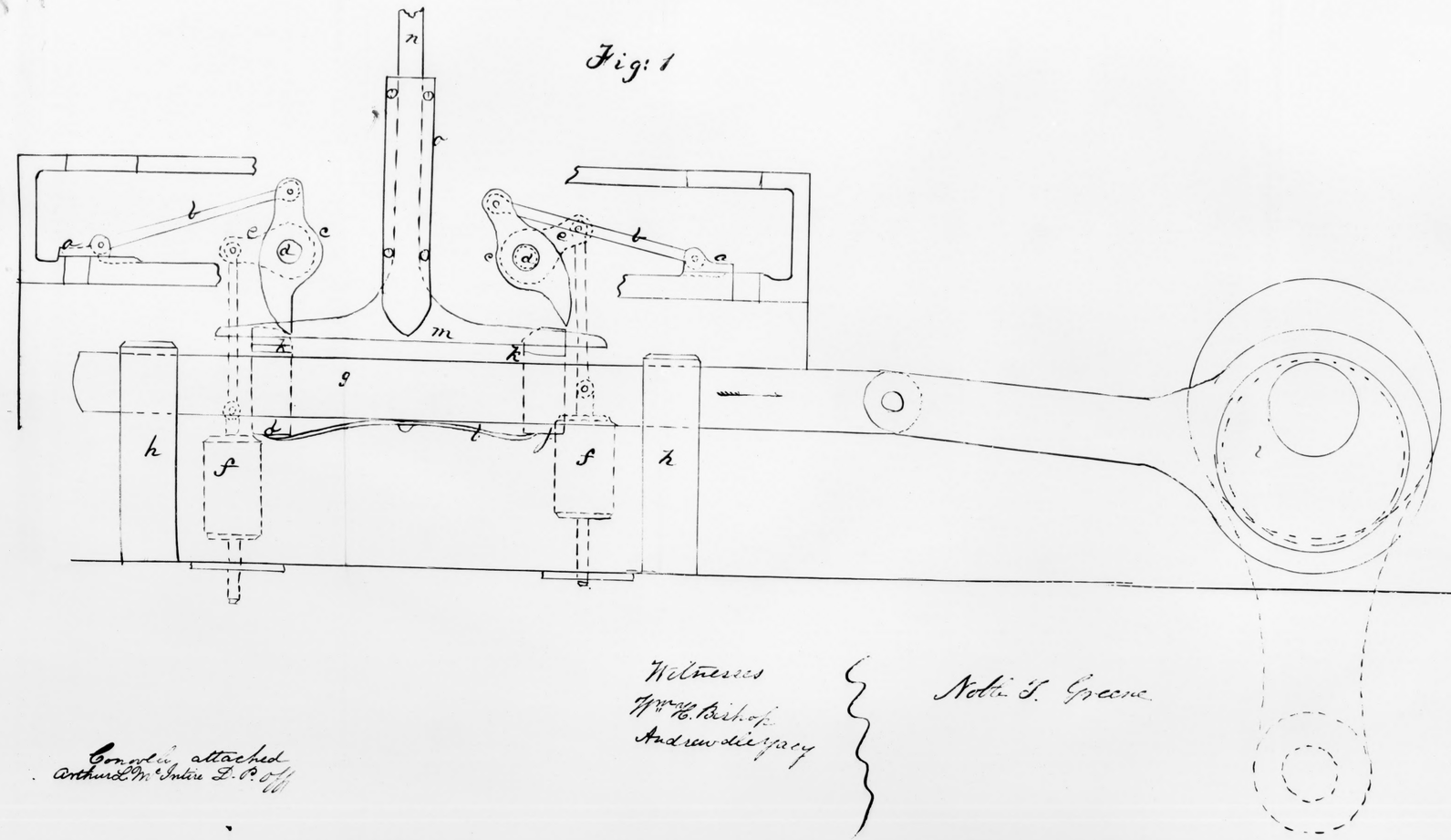
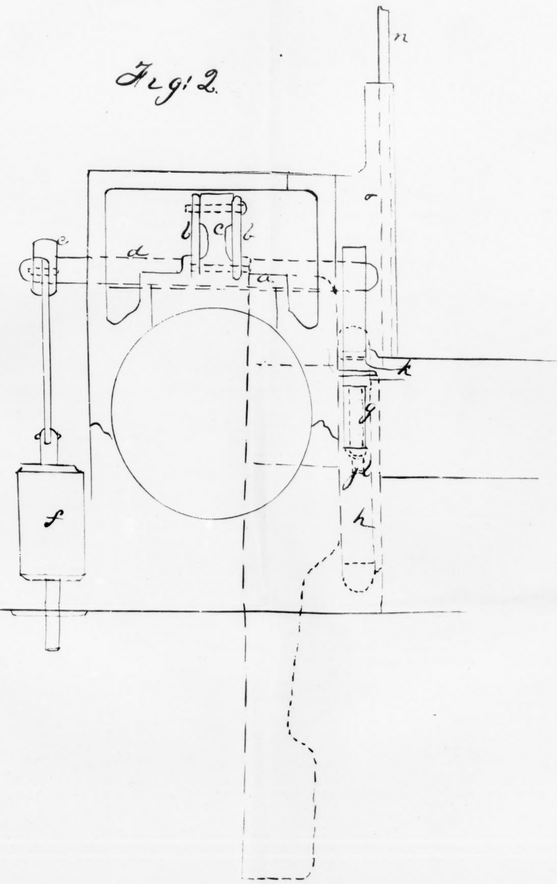


Fig: 2.



Witnesses
Wm H. Baldwin Jr.
Andrew Dickey

Nobis J. Greene

Copy of the attached
Arthur L. McIntire D. C. Off

Copy of G. H. Corliss pat.
Nov: 10/49.

Fig. 8.

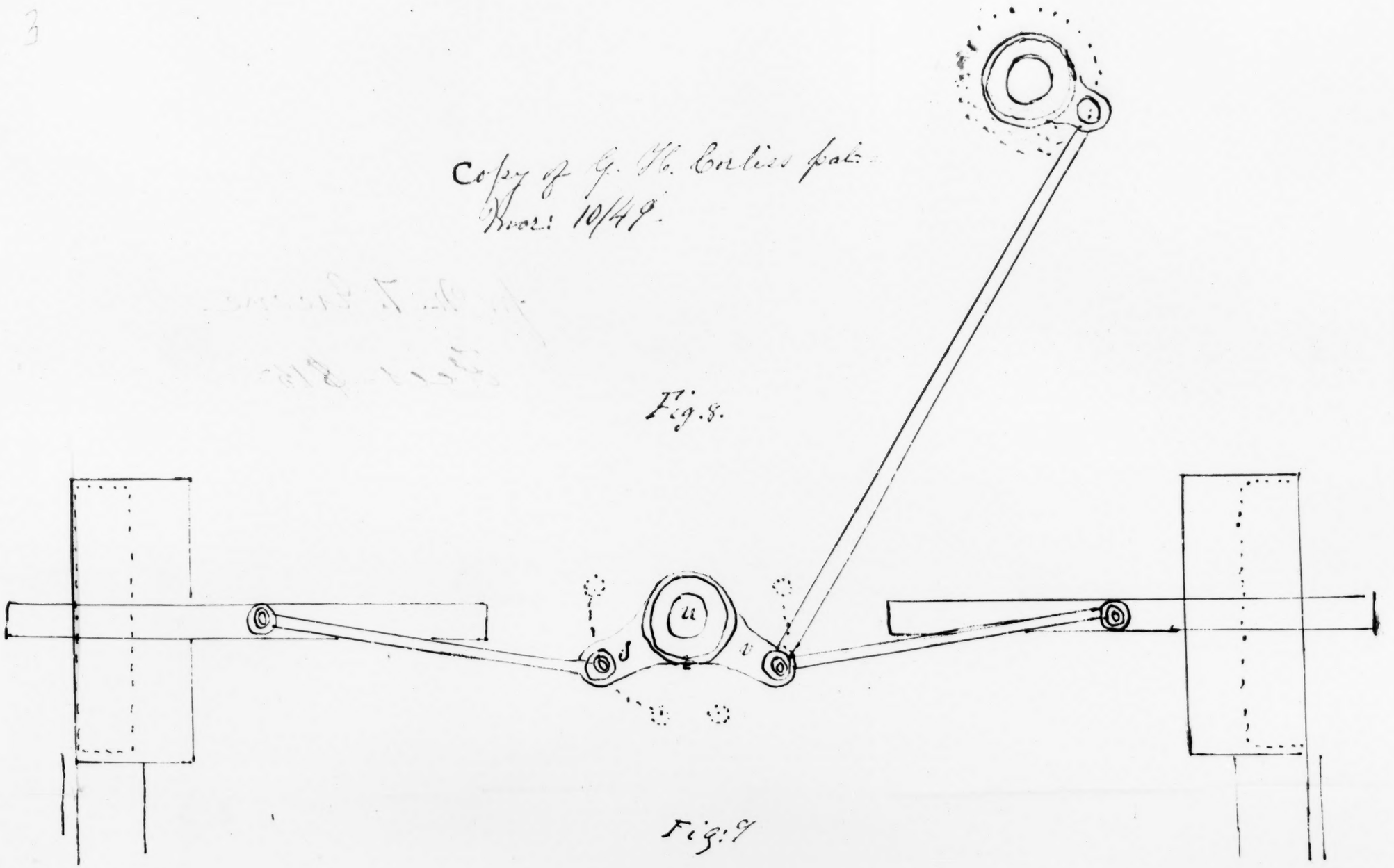
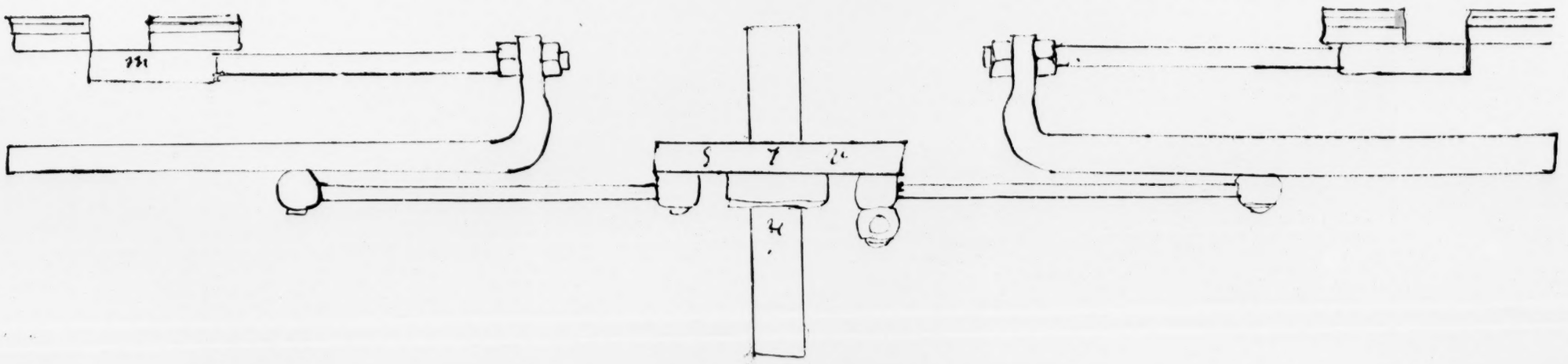


Fig: 9



Nr. 228. Wilhelm & Klein. Dampfmaschinen Co.
27 Cortlandt

Mechanical Engineers & Builders

Marine Apparatus Exam.

Steph. Wilhelm Carl Klein

Hoboken, September 1865.

No 8253

G. H. Corliss Variable Cut Off Motion.

Fig. 1.

Patented July 29. 1851

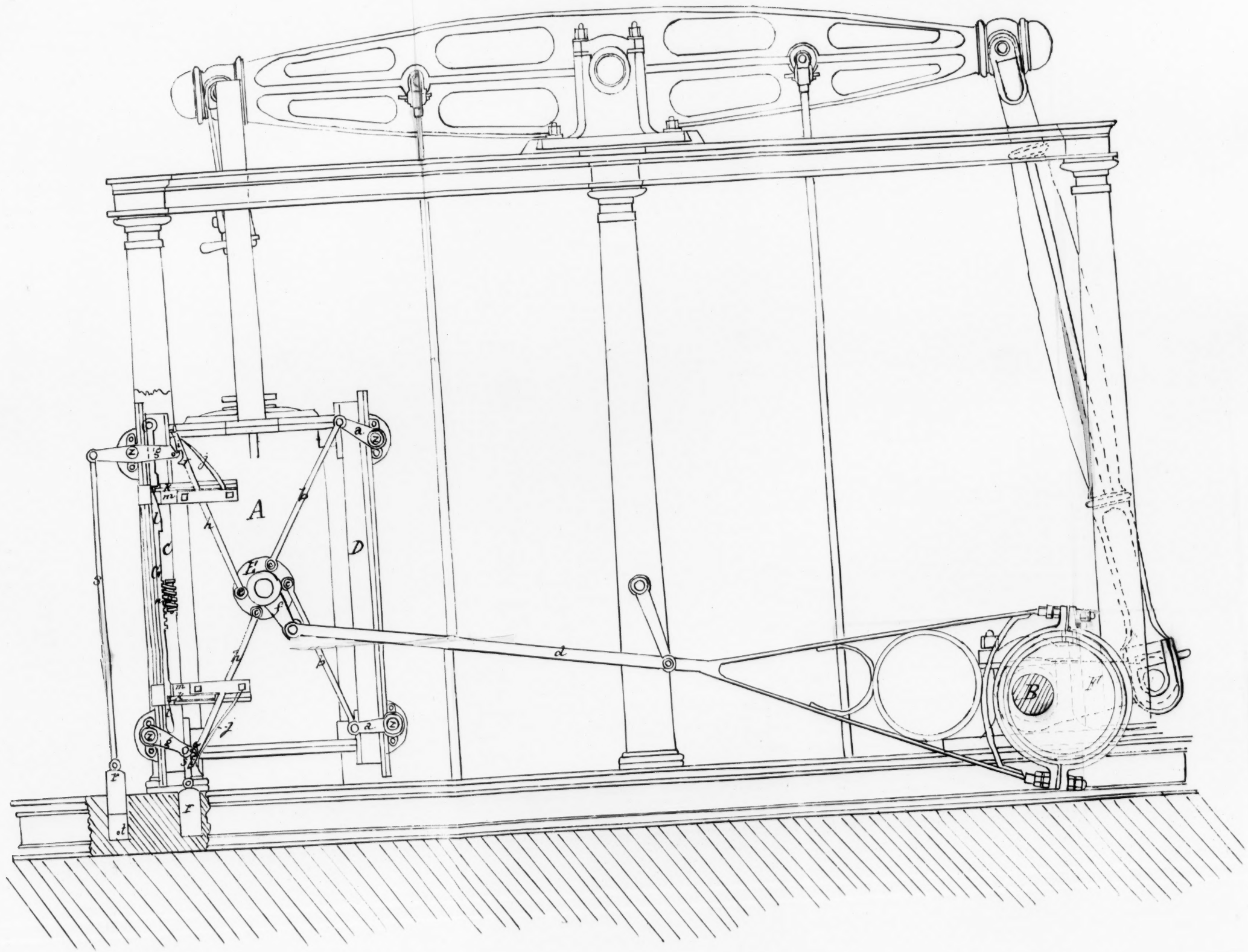


Fig. 4.

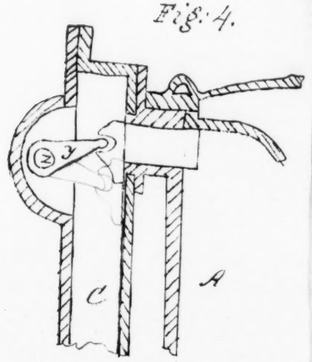


Fig. 2.

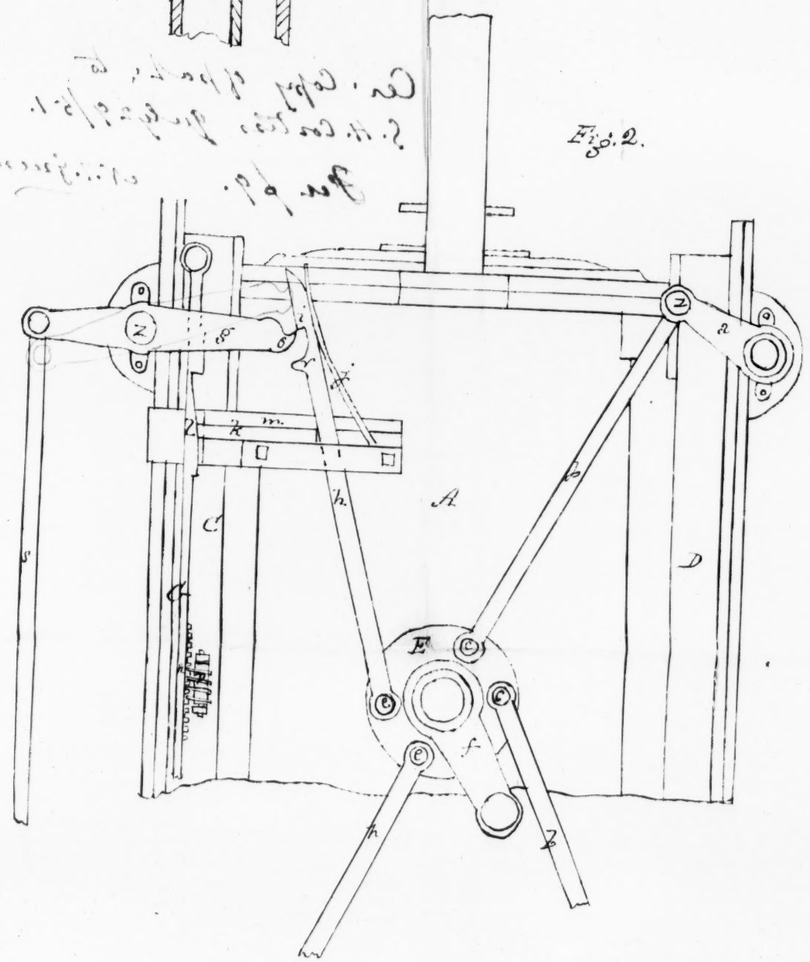
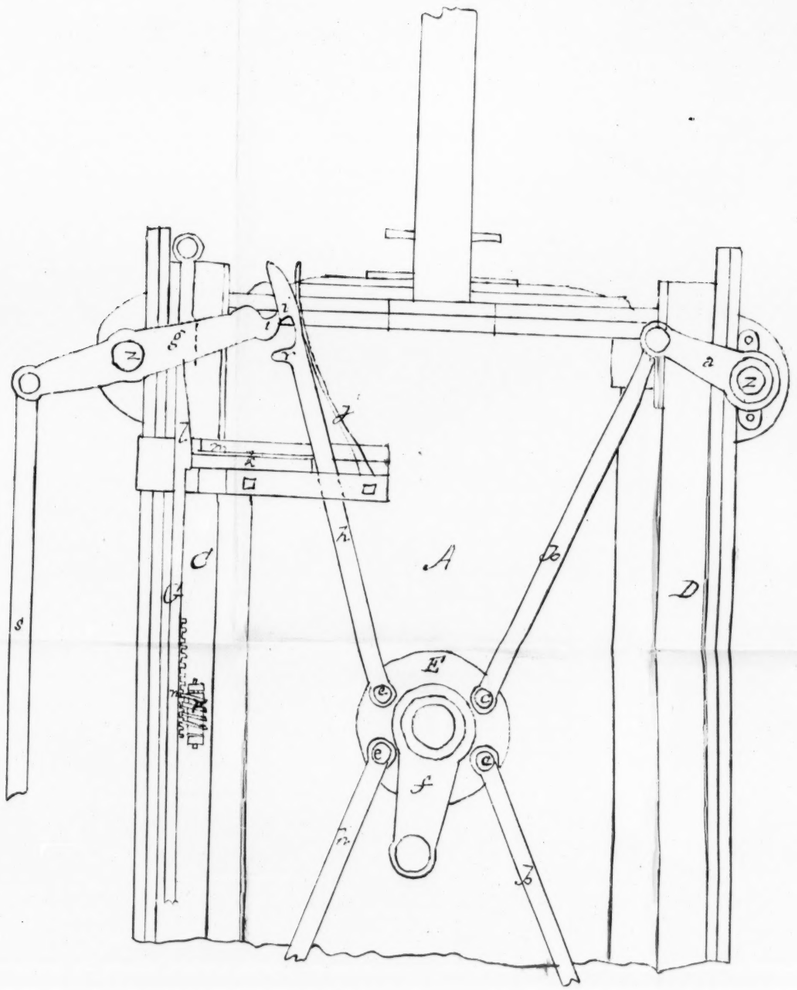


Fig. 3.



No 225 Wheeler & W. Manufacg Co. 65 Corliss
end of record

George H. Corliss's
Impts in Steam engines
Patented Mar. 10th 1849.

Fig. 1.

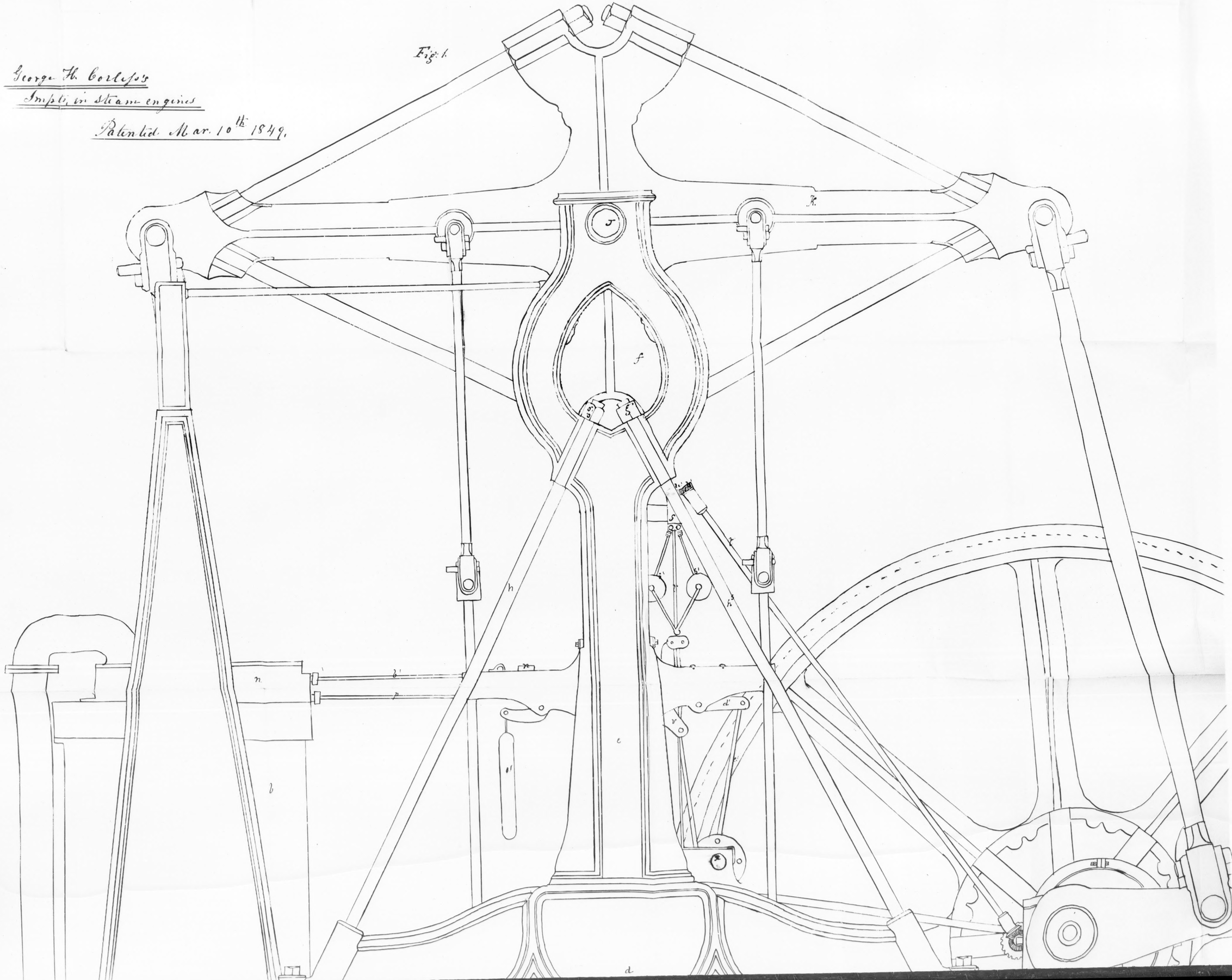

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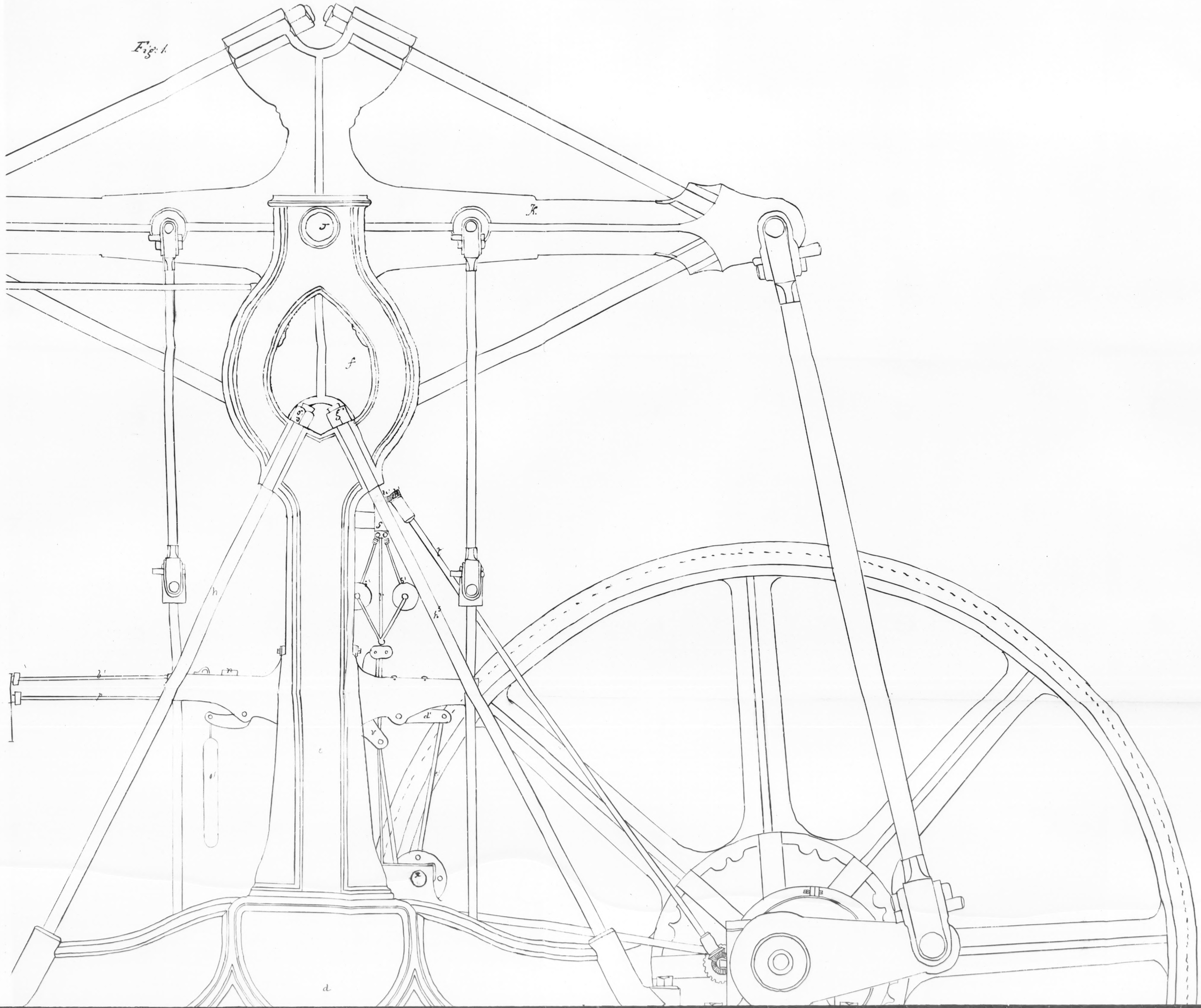
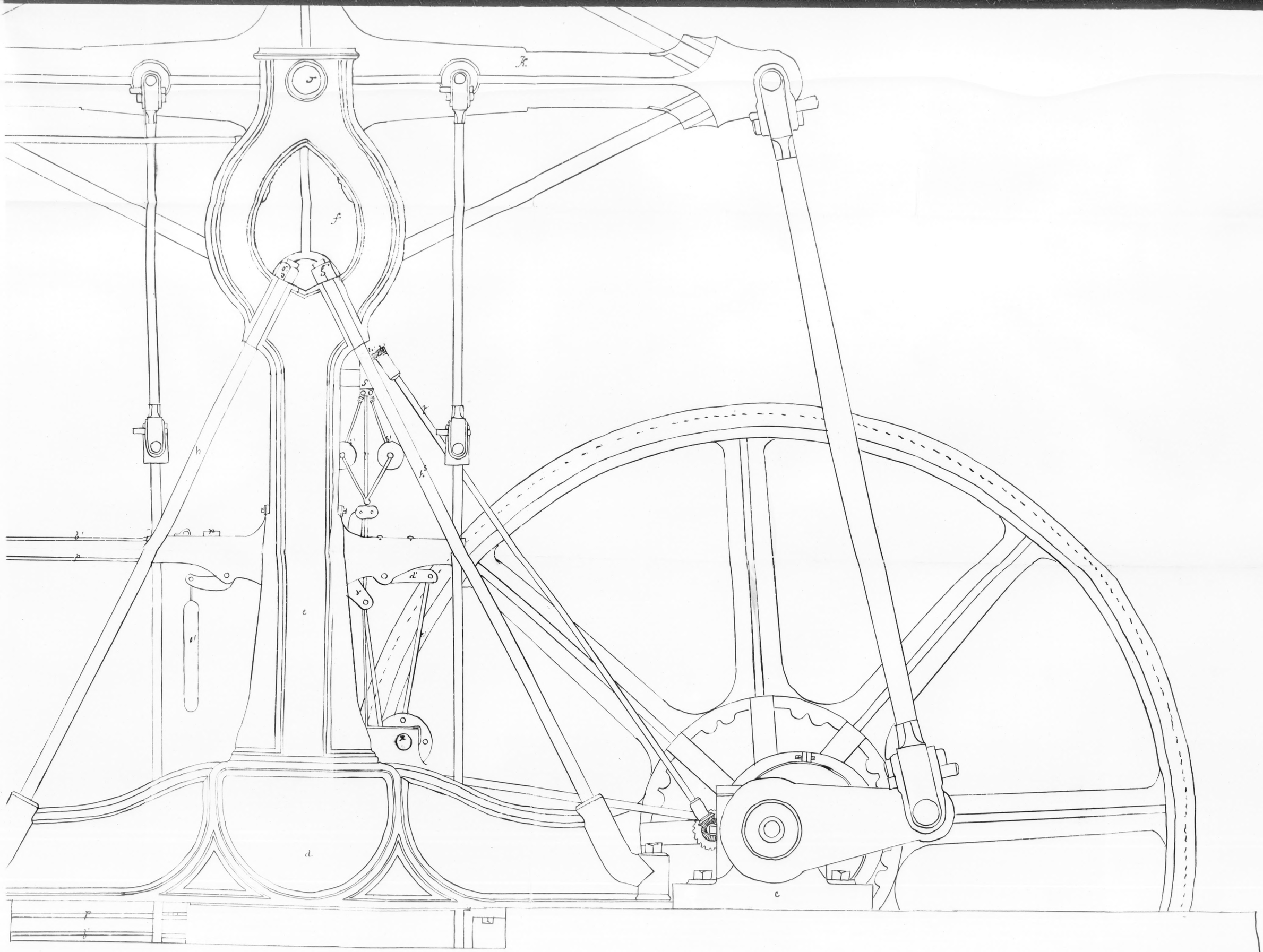
Fig: 1.




K.
f
h
e
d
c
a.

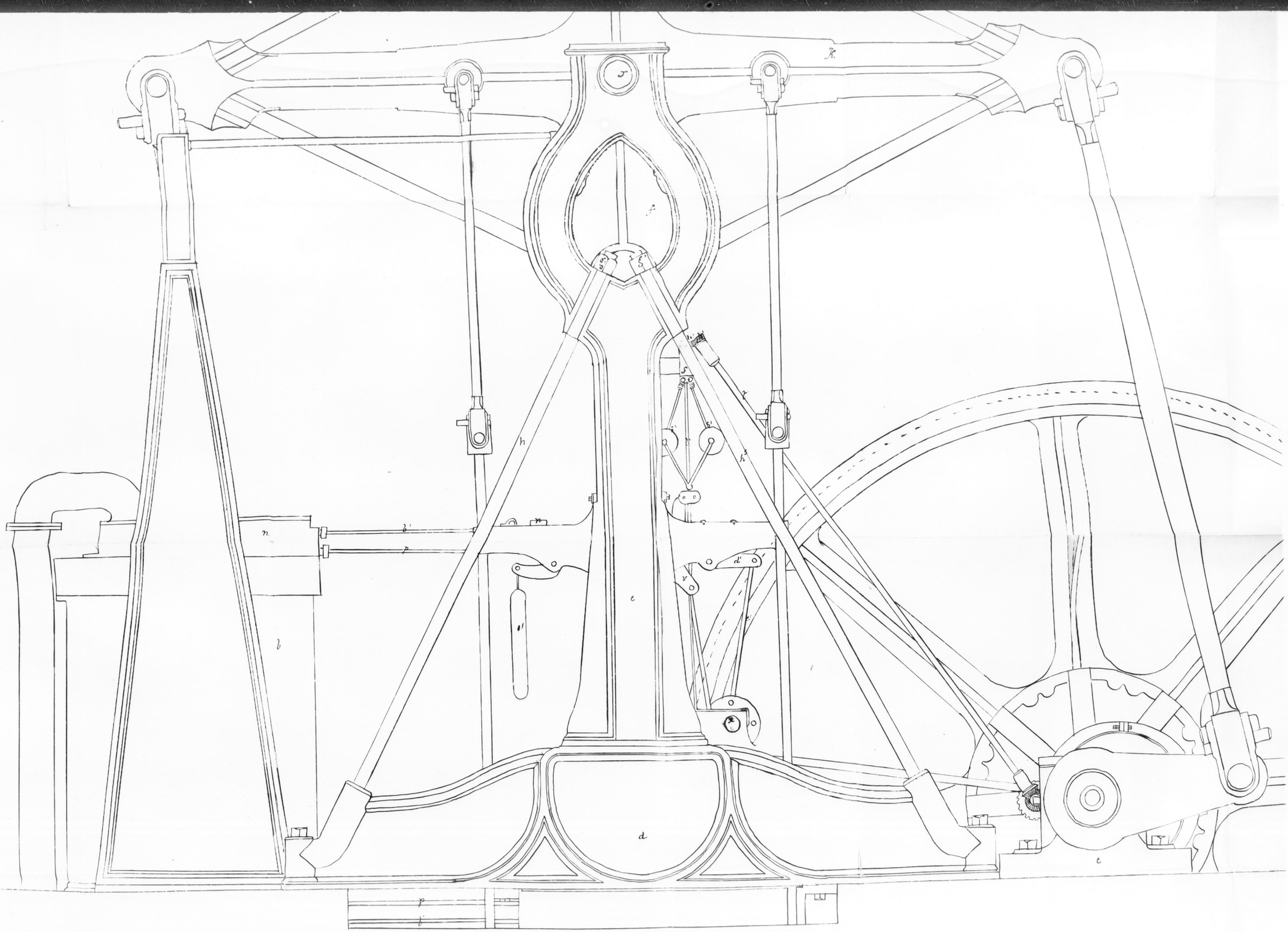

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Fig: 2

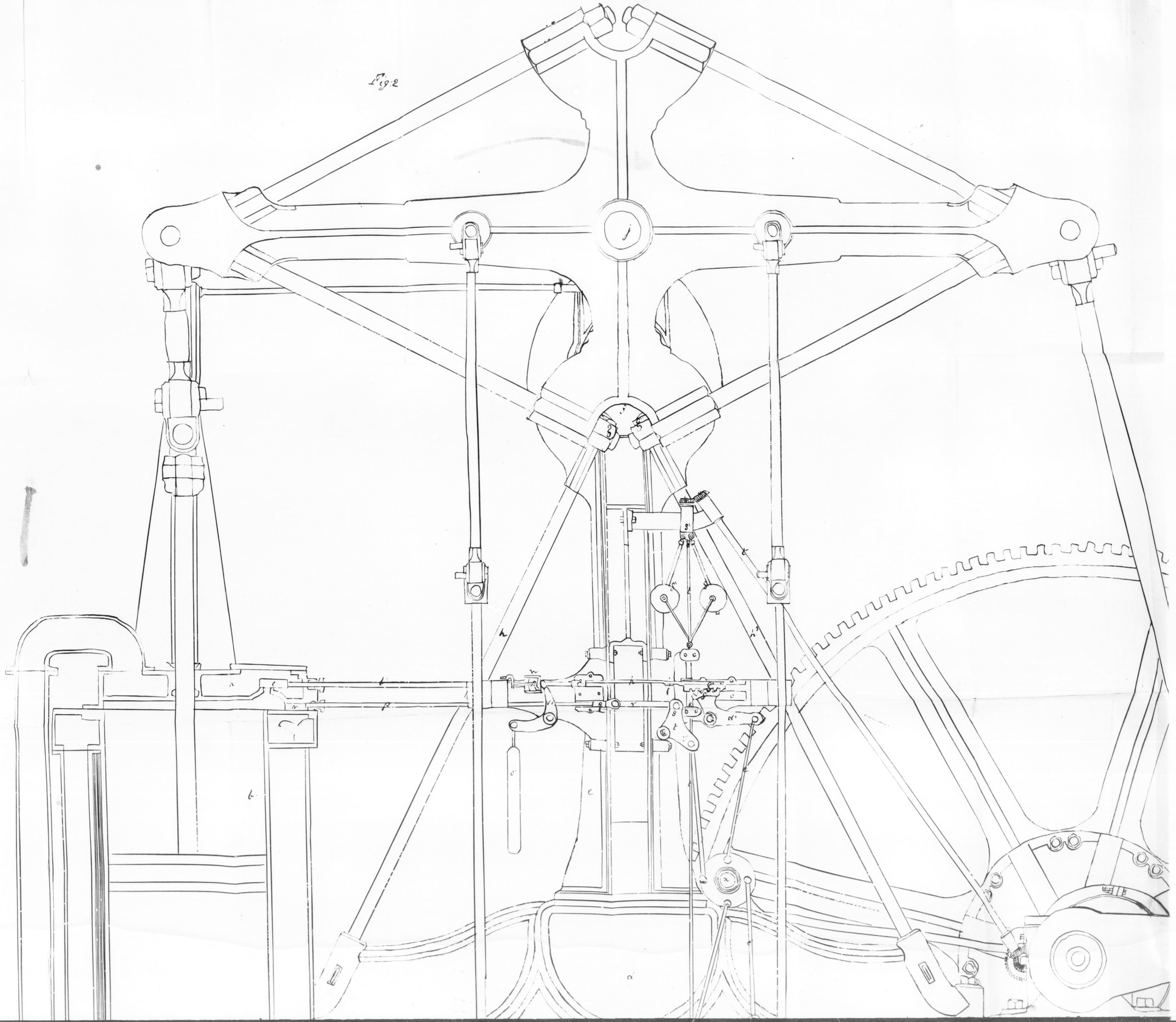
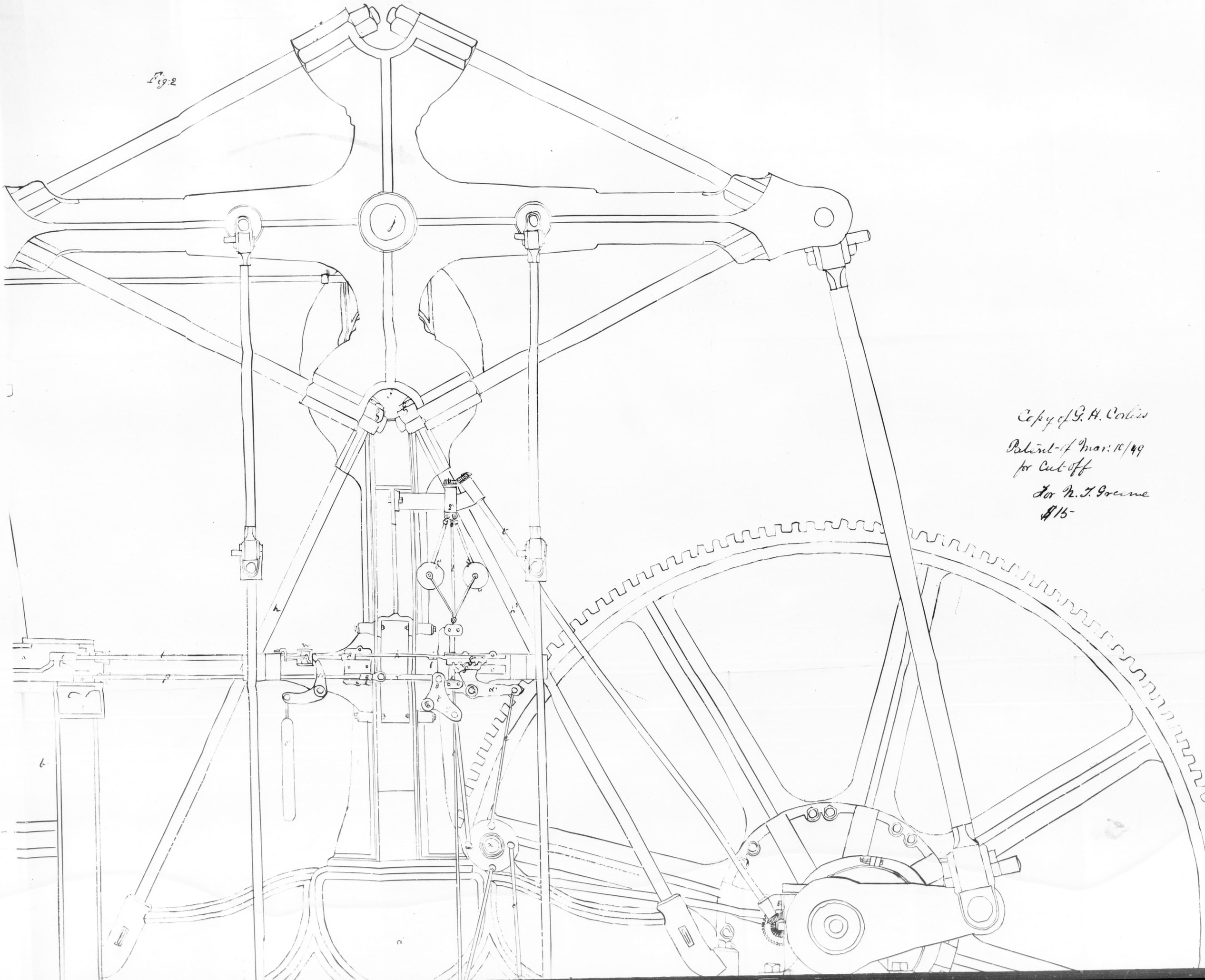
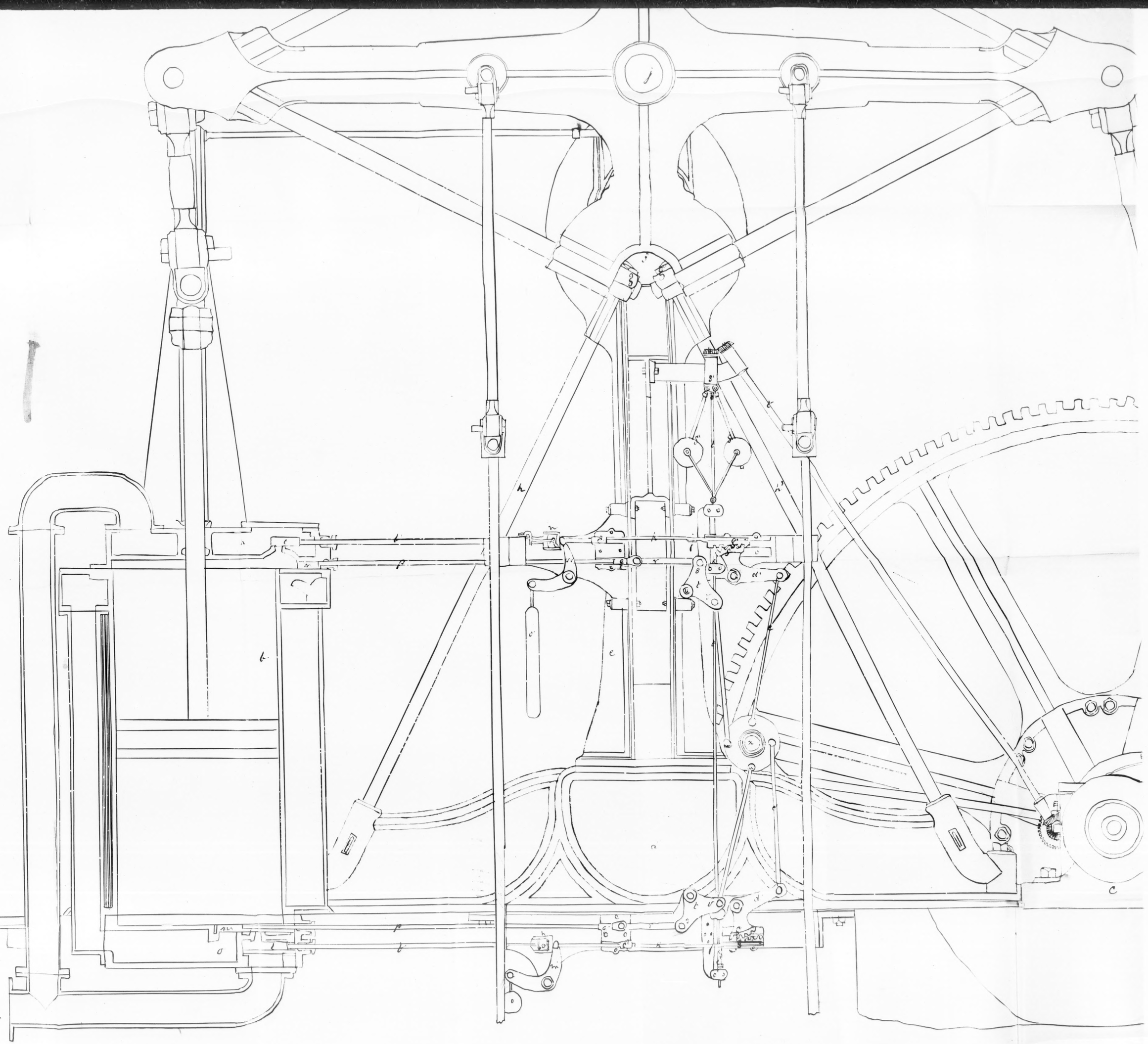


Fig: 2



Copy of G. H. Corliss
Patent of Mar: 10/49
for Cut-off
For R. T. Greene
#15-

Copy of G. H. Corliss
Patent 4 Mar: 10/49
for Cut-off
For N. T. Greene
#15-



No 254 Stone vs U.S
page 52

"F"

Kansas Reservation

Delaware Outlet

River

Soldier

10 miles wide and running West 200 Miles.

Kansas Vill.

Lands

Shawnee

Wakarusa River

Ottawas
24,000 Acres

Peoria Vill.

Peoria and Kaskaskias

Weas Vill.

Piankashaw

Weas and Piankeshaws

Grand River

Missouri

Sautarell River

Delaware

La Plume
Kansas Agency

Lands

Cheetsa or Stranger River.

Kaskaskias

Kansas River

3 mile Creek

Fort Leavenworth

Missouri River

Delaware Vill.

Shawnee Vill.

Little Platte River

Big Blue R.

Delaware Lands.

Surv'd in 1830

R. McCoy, Assist. Surv'r

OTTAWA LANDS

Surv'd in 1832

J.C. McCoy, Assist. Surv'r

Isaac McCoy, Surv'r

No 254- State of N. Y.
page 53.

MAP OF TOWNSHIP 8. RANGE 22
AND OF
Leavenworth City Corporation. K.T.

Scale 40 Chains to 1 inch

Plum Creek
Little Island
Kickapoo Island
Slough
S. 71° E.
Delaware & Kickapoo
To Kickapoo
North
To Riley
Road to Ft. Riley
Old Military Road
Fort.
Ferry
Missouri River
Salt Creek
Spring
United States Reserve
Salt Creek
Salt Creek Road
2 Mile Creek
Line of New
Leavenworth Island

J. Dawson
Graham & McDowel
I.R. Smoot
L. Wilmot
Catholic Cemetery
Thorn 10 A.
Gould
A. Shannon
160 A.
Hines
Kohn, Hamlin & Fogarty
Alexander M. Taylor 46.30A
A.P. Quinn 50.43 A
Dana 44.60 A
C. Hunley 155 A.
Jas. Dawson 160 A.
Hogan 160 A
Bragg 100 A.
Johnson 160 A.
City Cemetery
I. Alexander
B. Clint
William Reed
Budd
Jas. Hughes 160 A.
John Ouly 160 A.
Ettinger 160 A.
C. Hunley 160 A.
W. Hunley 160 A.
Bishop Meyer
J.C. Thornton
Johnson
J.H. Justi 163.72 A.
W. Hunley 160 A
Ligon 160 A.
Burgess 160 A.
Parrott & Moore
H. Podle
Porter Richardson & Others
Anton Williams
Horsh 10 A
Morgan 20 A
J. Taylor 169 A
W. Backus 159.35 A
R.G. Newland
B. Gable
W. Tanner
Jas Tanner
Mills & Isaacks
15.20 A
N.A. Kirk
Thos F. Scott

E.L. Berthoud
Civil Engineer
LEAVENWORTH CITY
Kansas.

Township No 9 S
R 22 E.

No 254. U.S. vs Stone
page 92

92

PLAT
of the
U.S. Reservation at Fort Leavenworth
for Military Purposes

surveyed under the directions of Capt. T.E. Hunt 4th Artly.
J.C. McCoy, Surveyor
In conformity with instructions from the Secretary of War

10 20 30 40 50 60 70 80 miles (Should be (in pencil) Chains

N
W — E

KICKAPOO ISLAND

KICKAPOO LANDS

WESTON

MISSOURI

STEAM FERRY

GOVT BOTTOM CORN FIELD

GOVT HOUSES

RESERVATION

LEAVENWORTH

Indian Surveys

Salt Creek

Land Office

Gen'l Land Office note in pencil
Line extended to the Nodaway River in 1861.

Gen'l Land Office note in pencil)
Line extended to the Nebraska River in 1861.

Survey of 1855

Salt Creek

Road to Fort Riley

Creek

Creek

Creek

Spring

Spring

Spring

Road to Westport and Kansas

Three Mile Creek

Corral Creek

Mule Stables

Barracks

Officers Quarters

Officers Quarters

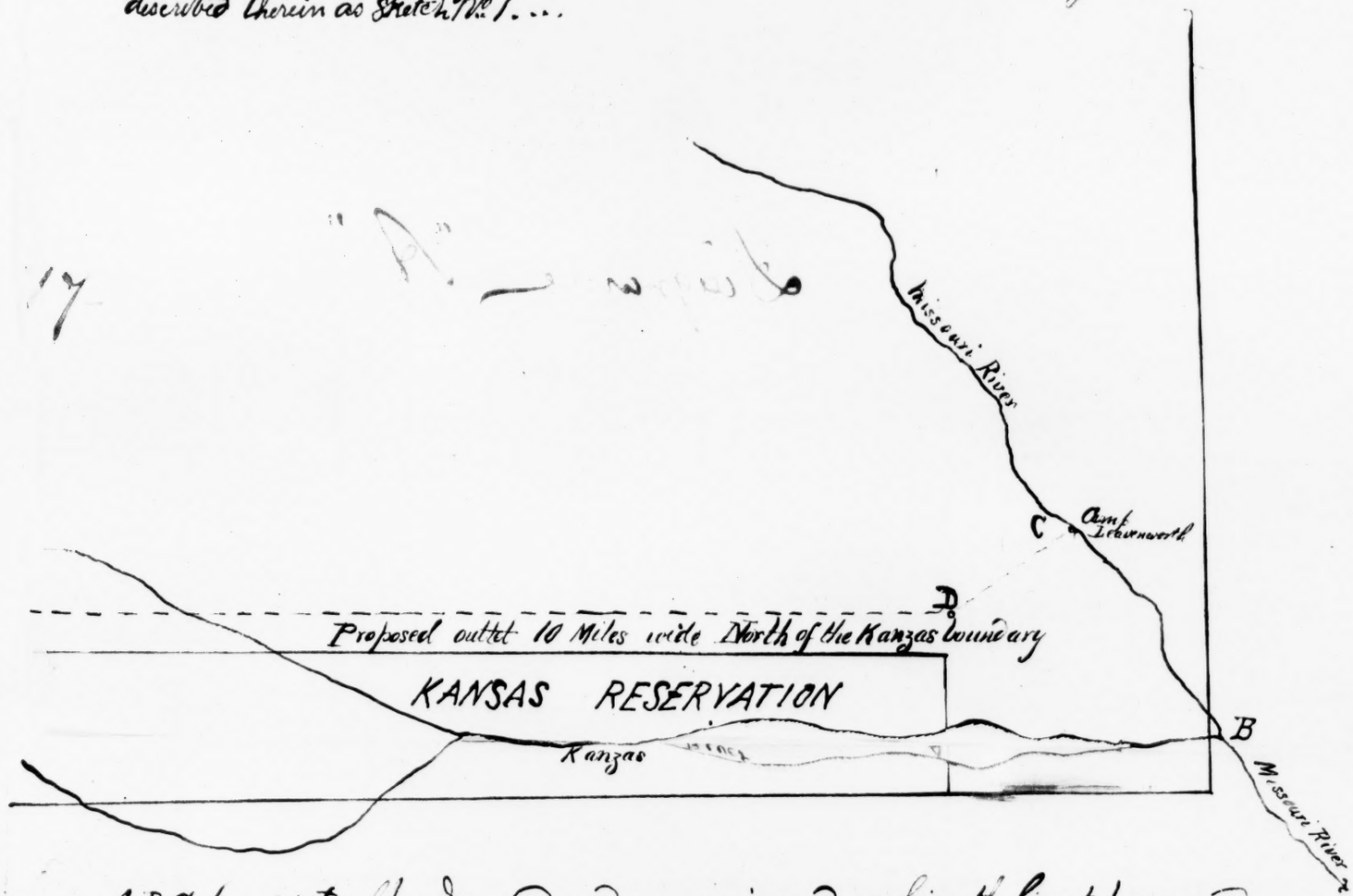
Officers Quarters

No. 254 Stone vs U. S

A.

p. 117

Copy of a sketch showing the lines to be run as the boundaries of the country of the Delaware Tribe of Indians which accompanied the letter of Thos. L. McKenney Esqr. dated Office Indian Affairs 3rd June 1830 and addressed to Revd Isaac McCoy and described therein as Sketch No 1. ...



A.B.C. from a natural boundary and need no running and marking the lines to be run and marked are from Camp Leavenworth until a point be reached 10 miles above North of the N.E. corner of the Kanzas Reservation and then West leaving the outlet as stated 10 miles in width A mound must be made at D, and the line thence West, to be marked plainly where there are trees, and where there are none, rocks are to be plunged in the ground, or mounds erected occasionally at about each 6 or 800 yards distance.

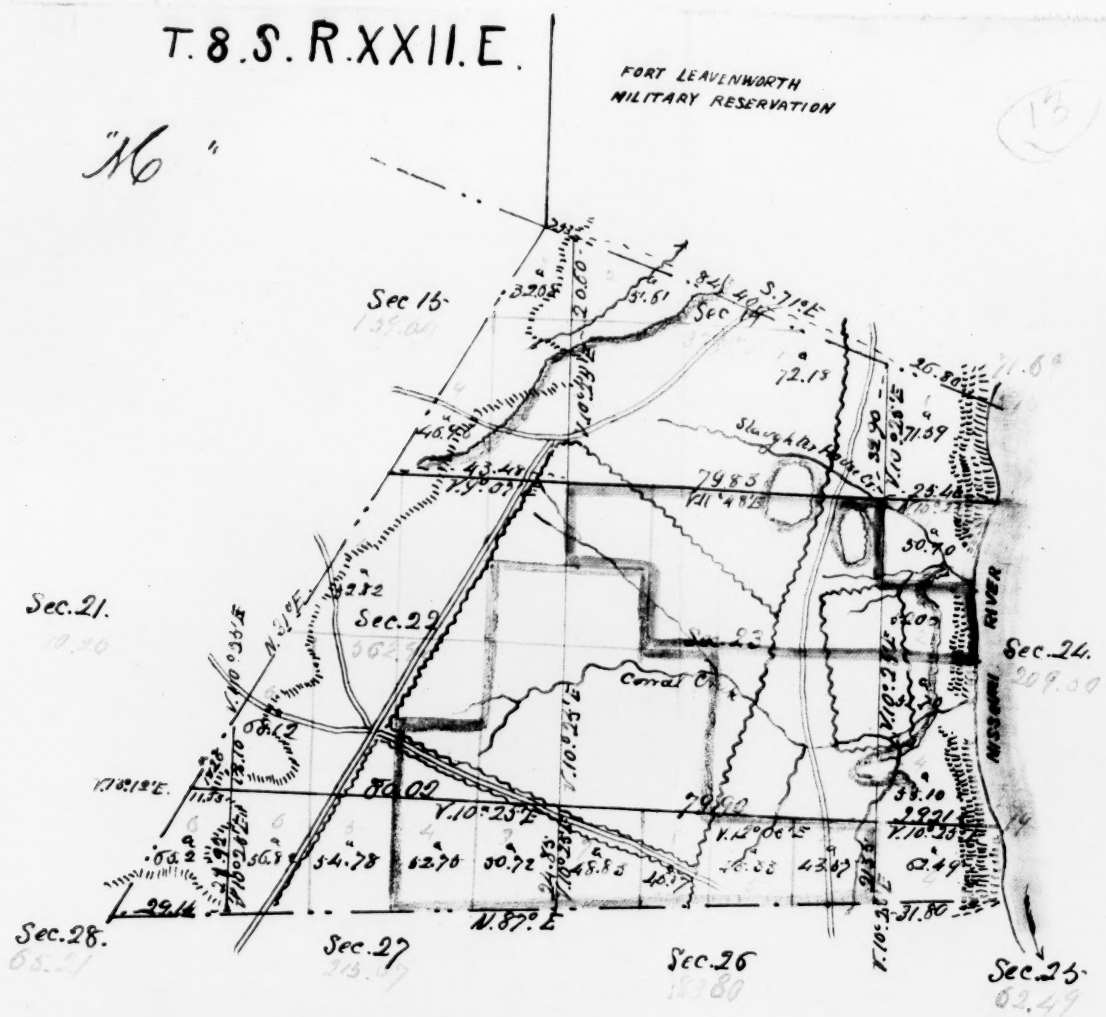
June 1830

(Signed) J. H. Eaton

No. 284 Stone vs U. S
page 60

T. 8. S. R. XXII. E.

"M"


FORT LEAVENWORTH
MILITARY RESERVATION
Sec 15.
Sec 14
Sec.21.
Sec.22
Sec.23
Sec.24.
Sec.28.
Sec.27
Sec.26
Sec.25.
RIVER
Canal
Slough
N. 87° E.
N. 10° 35' E.
N. 10° 25' E.
N. 2° 05' E.
S. 7° 15' E.
N. 87° E.
N. 10° 35' E.
N. 10° 25' E.
N. 2° 05' E.
S. 7° 15' E.
2020 feet
7985
7985
7900
2214
2214
2214

No 187 – Tobey Ds – Leonard et al.

1-328

N. 8° W. 14 1/25 R

No. 6.
141 Rods

N. 21° E. 15 R

S. 59° E. 17 1/2 R

2R

N. 2 1/2° E. 19 R

No. 5
1 acre 90 R.

W. 3° S. 14 3/25 R

E. 30° N. 10 1/5 R

S. 3° W. 16 33/25 R

14 14/25 R

No. 8
126 Rods

20 2/5 R

21 21/25 R

5 R.

S. 13° W. 10 R.

No. 2.
1 acre 90 R

E. 19° 23 1/5 Rods

W. 210 S. 24 R.

15 7/25. R.

No. 7

13 R

7 4/25

1 acre 133 R.

9 R

4 R

6 3/5

18 11/25 R.

N. 15° E. 15/25 E. 21° N. 9 R

W. 14 23/25 R

S. 23° E. 23/25 R

County N. 13° E. 10 8/25 R. Road

E

S

N

W

10 R. 21/25

No. 1. East of Road
1 acre 130 Rods

W. 2° S. 27 2/5 R.

E. 30° N. 27 R.

S. 8 1/2° W. 12 1/25 R.

E. 21 N. 10 1/2 R

No. 3 West of Road
6.6 Rods

N. 10 W. 5 R

E. 10 8/25 R.

W. 10 S. 10 R. 2/5

10 3/5 R

10 R.

9 R.

10 R.

No. 4
1 acre
148 R.

No. 3.
1 acre
173 R.

No. 1
1 acre
74 R.

No. 1
1 acre
90 R

30 R.

No. 5.
1 acre 50 Rods
90

9 3/5 R

13 1/5 R

11 14/25

10 13/25

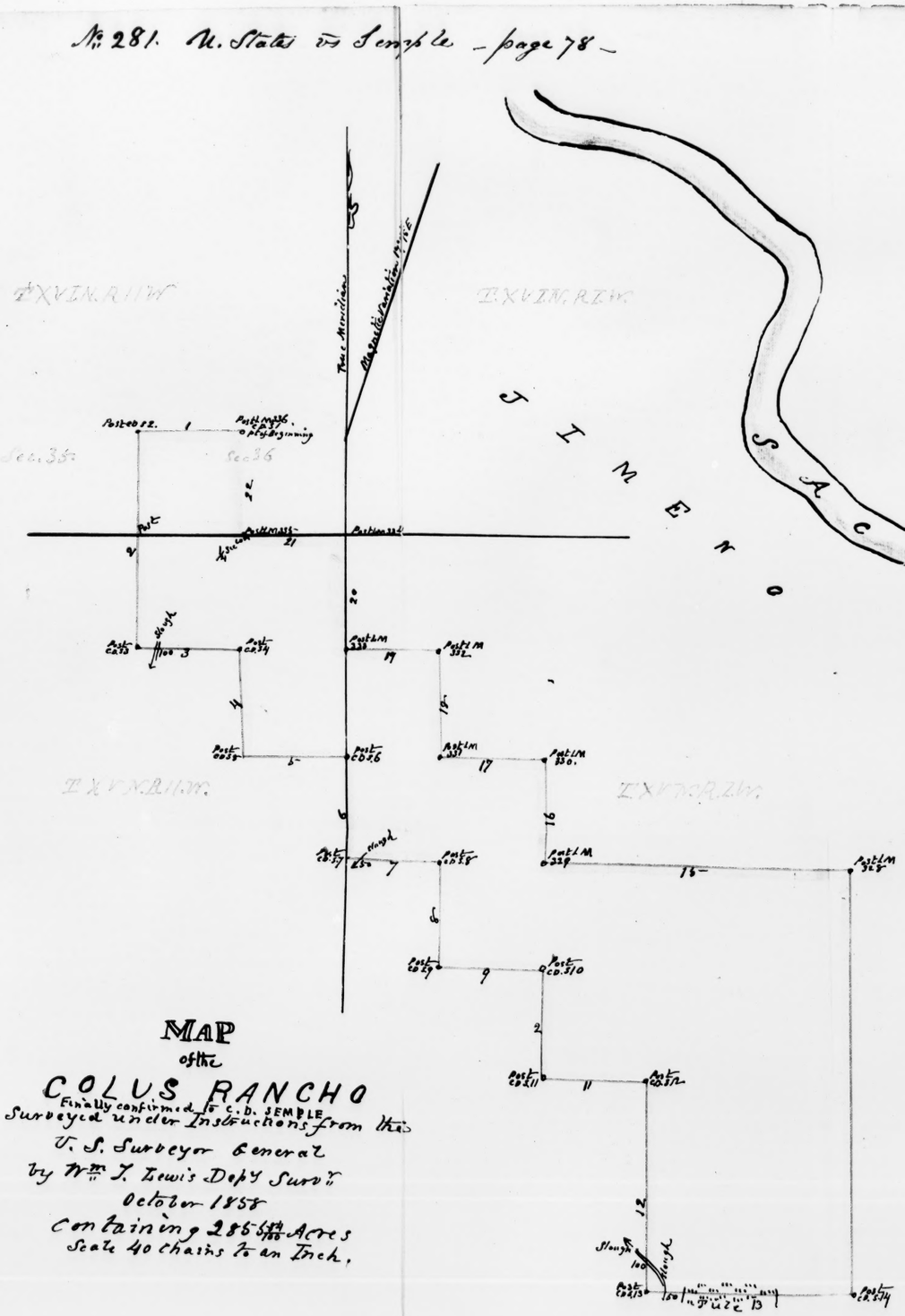
9 R.

9 3/5

Road to Long Plain

No. 281 R. Plate no dem[illegible]
Page 10-

No. 281. U. States vs Semple -page 78-


Mount Diablo Base Line
Mount Diablo Meridian
T. 14 N.
T. 13 N.
R. 1 W.
R. 2 W.
Sec. 35
Sec. 36
Sec. 1
Sec. 2
Post Mile 0.25 E. of Beg. Beginning
Post Cor. 1
Post Cor. 2
Post Cor. 3
Post Cor. 4
Post Cor. 5
Post Cor. 6
Post Cor. 7
Post Cor. 8
Post Cor. 9
Post Cor. 10
Post Cor. 11
Post Cor. 12
Post Cor. 13
Post Cor. 14
Post M. 330
Post M. 331
Post M. 332
Post M. 333
Post M. 334
Post M. 335
Post M. 336
Slough
Slough
Slough

No 281 - U. S. vs Semple. pa. 281

T. 17 N. R. 2 W.

JIMENO RANCHO

Slough

Post C.M.2

Sec. 34

Sec. 35

Lot No. 38

Sec. Post

Sec. 3

Sec. 2

Beginning

Post L.M. 26

Post L.M. 27

Cottonwood L.M. 39

Post L.M. 40

Post L.M. 41

Cottonwood L.M. 42

Cottonwood L.M. 43

Post L.M. 38

Post L.M. 37

Post L.M. 36

Post L.M. 35

Post L.M. 34

Post L.M. 33

Post L.M. 32

Post L.M. 31

Post L.M. 30

Post L.M. 29

Cottonwood L.M.

Sycamore L.M. Aclaout

R. Walton's Beginning corner L.M. 44.

Post L.M. 45

Post L.M. 46

Oak L.M. 47

Cottonwood L.M. 48

Oak L.M. 49

Oak L.M. 50

Leaning Oak L.M.

Oak L.M. 52

Oak L.M. 53

Post L.M. 54

Oak L.M. 55

Dead Cottonwood L.M. 56

Slough

Box Elder L.M. 57

Post L.M. 58

Post L.M. 59

Post L.M. 60

Post L.M. 61

Post L.M. 62

Post L.M. 63

Oak L.M. 68

Willow

Post L.M. 67

Post L.M. 65

Post L.M. 64

Willow

Post L.M. 69

Post L.M. 70

Post L.M. 71

Post L.M. 72

Oak L.M. 73

Post L.M. 74

Slough

Colusa Ditch Stream bottom lands

Post L.M. 75

Post L.M. 76

Cottonwood L.M. 77

Post R.R. L.M. 78 N.E. Cor. of Colusa Town

Post L.M. 79

Town of Colusa

Colusa Ditch

Post R.R. S.E. Cor. of Colusa Town

Sec. 25

Sec. 30

Sec. 36

Sec. 31

T. 16 N. R. 2 W.

Lot No. 37

T. 16 N. R. 1 W.

Lot No. 37

JIMENO RANCHO

Dry Gulch

Post C.R. 4

L.M. 338

Post C.R. 5

L.M. 337

Post C.R. 6

N. 83.54 W.

6.42

5

4

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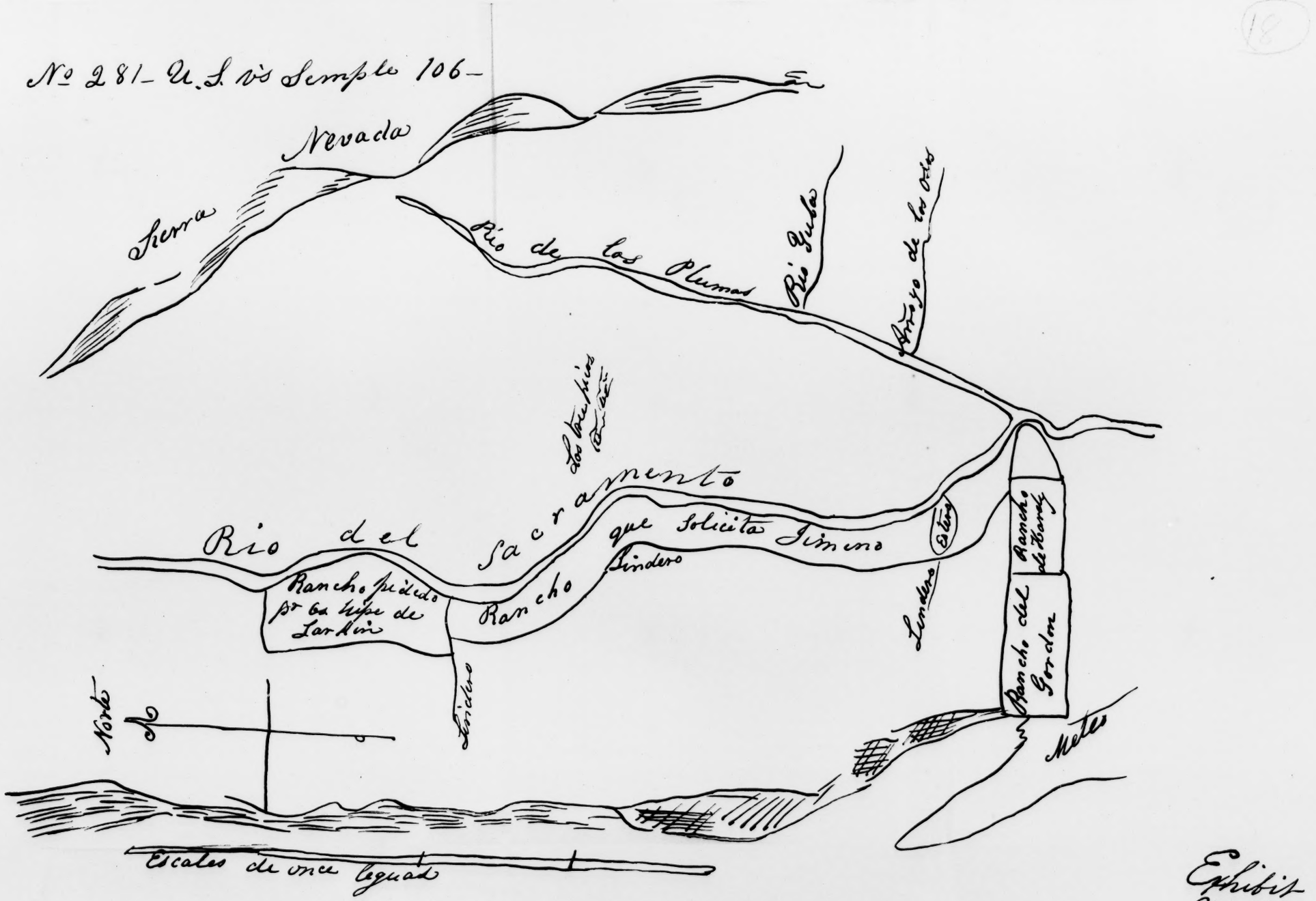


Exhibit No 1 Wht

PLAT
of the
COLUS RANCHO
Finally Confirmed to
J. D. SEMPLE.
Surveyed under Instructions
from the
U.S. SURVEYOR GEN'L
By
Wm. J. Lewis Dep'y Surv'r
October 1858
Containing 8896.00 Acres.
Scale 40 chs to 1 Inch.
Variation 17° E.

Beginning Post E.M. 326 Mound E.M. 77 Post E.M. 75 Post E.M. 76 Post E.M. 80 Post E.M. 81 Post E.M. 82 Post E.M. 83 Post E.M. 84 Post E.M. 85 Oak E.M. 86 Post E.M. 87 Sycamore E.M. 88 Indian Rancheria Post E.M. 89 Oak E.M. 90 Buckeye 19 Post E.M. 91 Post E.M. 92 Post E.M. 93 Post E.M. 94 Post E.M. 95 Post E.M. 96 Post E.M. 97 Post E.M. 98 Post E.M. 99 Post E.M. 100 Post E.M. 101 Post E.M. 102 Post E.M. 103 Oak E.M. 104 Oak E.M. 105 Oak E.M. 106 Post E.M. 107 Post E.M. 109 Post E.M. 110 Post E.M. 111 Sycamore E.M. 113 Oak E.M. 114 Post E.M. 115 Oak E.M. 116 Post E.M. 117 Post E.M. 118 Oak E.M. 120 Post E.M. 121 Oak E.M. 122 Post E.M. 123 House

Town of Colusa

Third Standard North.

T. 16 N. R. 2 W. T. 16 N. R. 1 W. T. 15 N. R. 1 W.

Post E.M. 327 Post E.M. 326 Post E.M. 334 Post E.M. 335 Post E.M. 333 Post E.M. 332 Post E.M. 331 Post E.M. 330 Post E.M. 329 Post E.M. 328

Sec. 1 Sec. 6 Sec. 7 Sec. 11 Sec. 12 Sec. 13 Sec. 18 Sec. 19 Sec. 24 Sec. 25 Sec. 30 Sec. 31 Sec. 36

Western Boundary

Line of Timber Ranch

Line of Desert

Rancheria Creek

Stream

Third Ferry

Colusa

Sacramento River

Surveyed in Sept. & Oct. 1858 (2)

PLAT
of the
COLUS RANCHO
Finally Confirmed to
C. D. SEMPLE
Surveyed under Instructions
from the
U.S. SURVEYOR GEN'L
By
Wm J. Lewis Dep'y Sur
October 1858
Containing 8896 100 Acres.
Scale 40 chs to 1 Inch

Variation 17° E.

Beginning Post E.M. 76 Cor. Sec. 31 T. 16 N. R. 3 W. Mt. Diablo Base

Town of Colusa

Levee Road

Levee Road to Grimes

Post E.M. 77

Post E.M. 75

Post E.M. 74

Post E.M. 73

Post E.M. 72

Post E.M. 71

Post E.M. 70

Post E.M. 69

Post E.M. 68

Post E.M. 67

Post E.M. 66

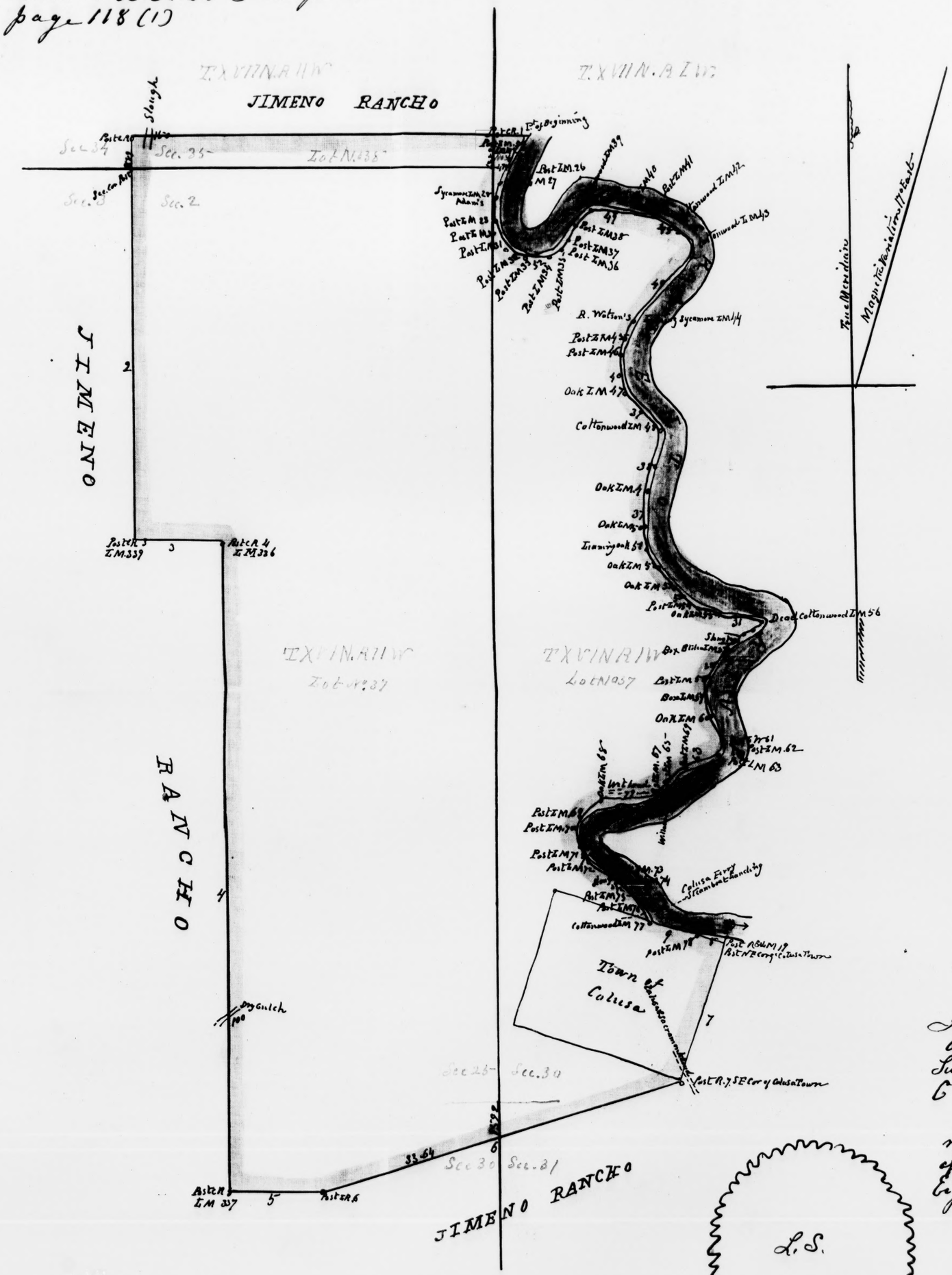
Post E.M. 65

Post E.M. 64

Post E.M. 63

Post E.M.

No. 281 U.S. to Semple
page 118 (1)



No.	Courses	Chains	No.	Courses	Chains
1	West	12.44	32	N. 77¼° W.	10.49
2	South	13.39	33	" 45° "	13.20
3	East	10.00	34	" 40° "	10.36
4	South	10.00	35	" 53¾ "	10.50
5	East	10.00	36	" 9° E.	9.16
6	N. 73¾° E.	26.40	37	" 58¾ E.	13.60
7	N. 18° E.	12.74	38	" 14¾ "	23.56
8	" 7¾ "	12.58	39	" 14¾ W.	22.77
9	" 7¾ "	21.49	40	" E.	17.59
10	" 23 "	7.90	41	" 17¾ E.	6.60
11	" 3¾ "	8.00	42	" 23¾ "	9.00
12	" 45¾ "	8.00	43	" 31¾ "	41.00
13	" 27½ "	8.00	44	" 37½ "	18.44
14	" 17¾ "	6.81	45	" 6¾ "	14.50
15	" 7¾ "	8.18	46	" 6¾ "	8.23
16	" 7¾ "	12.00	47	" 6¾ "	18.50
17	" 17¾ E.	8.80	48	S. 44½ E.	5.70
18	" 27¾ "	8.50	49	" 23¾ "	7.00
19	" 37¾ "	23.61	50	" 3° "	4.17
20	" 6¾ "	3.61	51	" 34¾ "	2.35
21	" 35 "	3.70	52	" 10 "	5.32
22	" 43 "	18.56	53	" 13¾ "	8.00
23	" 7¾ "	16.00	54	" 17¾ "	5.00
24	" 6¾ "	2.63	55	" 24¾ "	4.40
25	" 0¾ "	4.13	56	" 24¾ "	5.00
26	" 2¾ W.	11.00	57	" 17¾ "	5.00
27	" 17¾ "	10.76	58	S. E.	10.42
28	" 8° E.	5.00	59	" 4¾ "	6.44
29	" 33 "	17.70	60	" 43¾ "	7.00
30	" 34¾ "	17.86	61	" 3° "	4.00
31	" 53¾ W.	20.62	62	" 14¾ "	1.82

PLAT
- of the -
Colus Rancho
Finally Confirmed to
C. D. SEMPLE
Surveyed under instructions from the
U.S. SURVEYOR GENERAL
by
Wm. J. Lewis Dep. Sur
October 1868
Containing 8876 2/100 Acres
Scale 40 Chains to 1 inch.

U.S. Surveyor Generals Office
San Francisco Jany 17th 1862

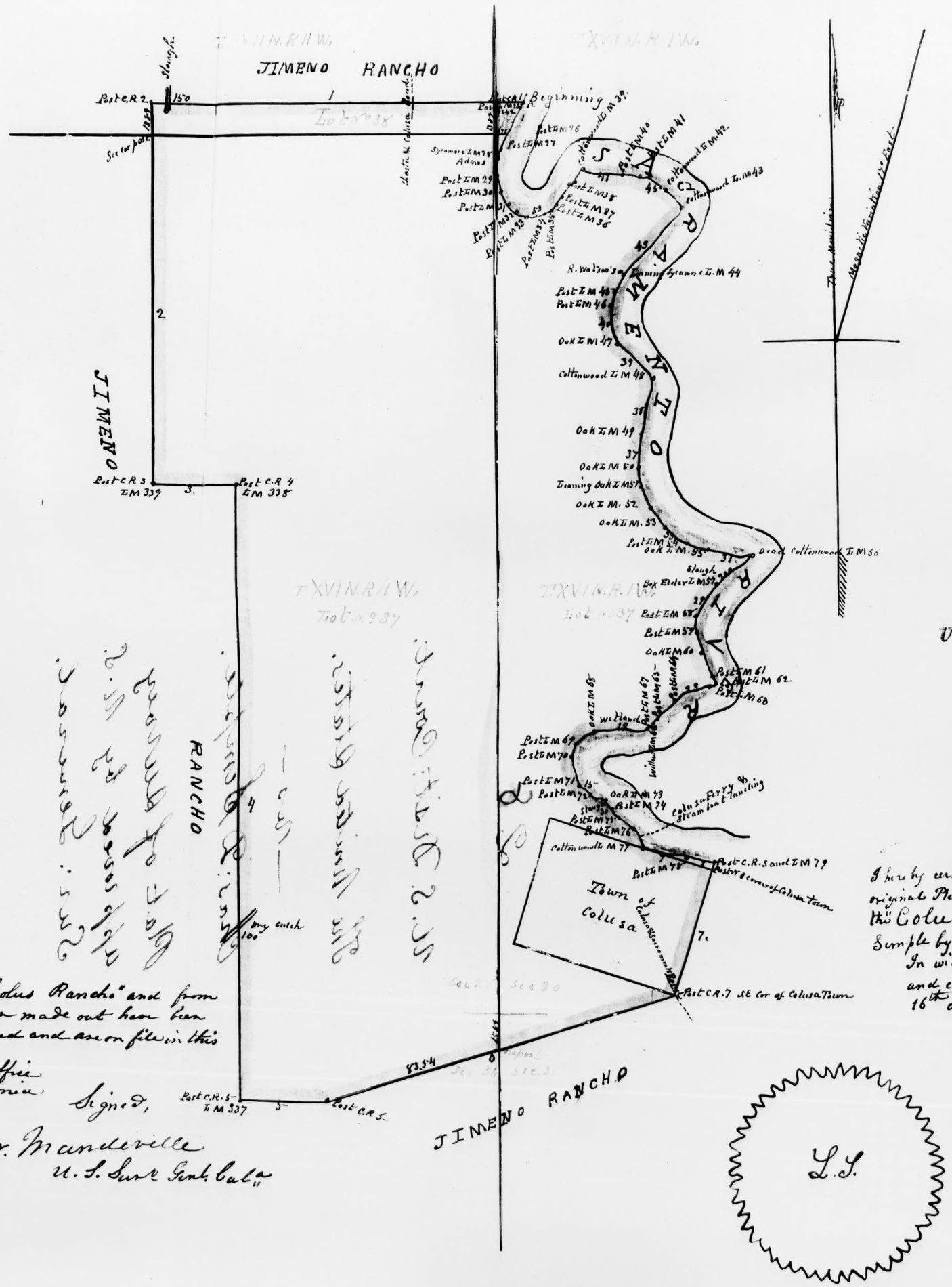
I certify this to be a full true and correct Copy of the original Plat on file in this office of an official Survey of the "Colus Rancho" finally confirmed to C. D. Semple

In Witness whereof I have hereunto signed my name, and caused the Seal of this office to be affixed this Seventeenth day of January, one thousand eight hundred and Sixty

J. W. Mandeville
Approved Jan. 31. 1861 U.S. Surveyor General
Ogden Hoffman
Dist. Judge

L.S.

In 2811 U.S. States vs Semple page 140


JIMENO RANCHO
Post C.R 2
150
Slough
Sycamore
Post C.R 3 IM 339
Post C.R 4 IM 338
JIMENO
RANCHO
Post C.R 5 IM 337
Post C.R 6
JIMENO RANCHO
Post C.R 7 SE Cor of Colusa Town
Colusa Town
Post C.R 8 and IM 79
Post IM 78
Cottonwood IM 77
Willow IM 76
Post IM 75
Post IM 74
Oak IM 73
Willow IM 72
Post IM 71
Post IM 70
Willow IM 69
Willow IM 68
Cottonwood IM 67
Willow IM 66
Willow IM 65
Willow IM 64
Post IM 63
Post IM 62
Post IM 61
Dead Cottonwood IM 60
Oak IM 59
Post IM 58
Box Elder IM 57
Slough
Dead Cottonwood IM 56
Oak IM 55
Post IM 54
Oak IM 53
Oak IM 52
Oak IM 51
Teaming Oak IM 50
Oak IM 49
Cottonwood IM 48
Oak IM 47
Post IM 46
Post IM 45
R. Walton's Teaming Sycamore IM 44
Cottonwood IM 43
Cottonwood IM 42
Post IM 41
Post IM 40
Cottonwood IM 39
Post IM 38
Post IM 37
Post IM 36
Post IM 35
Post IM 34
Post IM 33
Post IM 32
Post IM 31
Sycamore IM 28 Adams
Post IM 29
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Willow IM 98
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Willow IM 100
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